

**Bond University**

## **DOCTORAL THESIS**

### **A Statutory Formula for the Admission of Similar Fact Evidence Against a Criminal Accused**

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**A STATUTORY FORMULA FOR THE ADMISSION OF  
SIMILAR FACT EVIDENCE AGAINST A CRIMINAL  
ACCUSED**

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A thesis submitted in total fulfilment of the requirements  
of the award of the degree of Doctor of Philosophy

FACULTY OF LAW, BOND UNIVERSITY

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## ABSTRACT

The law governing the admission, against a criminal accused, of what is referred to – sometimes inaccurately - as “similar fact evidence” has been allowed to acquire a complexity which is not wholly justified. This complexity has arisen as the result of two errors which have operated in tandem for the best part of two centuries. The first is to regard *all* instances in which a criminal accused’s additional (usually prior) misdeeds are disclosed to a court as “similar fact evidence”, when in fact many such disclosures involve facts which are *far from* similar. The second has been the attempt to rationalise and regulate the law on such disclosure along the lines of the *purpose* for which it is admitted, when in fact it is best approached from the standpoint of *its natural relevance to the case as a whole*.

This thesis corrects the first misconception, and identifies what is herein described as “similar fact evidence properly so called”. It then proceeds to a critical examination of the historical treatment, by common law courts around the world, of additional misdeeds of a criminal accused, and argues that the current state of confusion surrounding the subject is due primarily to the failure to acknowledge that *relevance is the key to admissibility*.

This has finally been recognised in both New Zealand and Canada. The Supreme Court of Canada, in its ruling in *Handy*, also gave detailed guidance to all future trial judges in that jurisdiction regarding those factors which made similar fact evidence so “relevant” to an issue in a case that it should be admitted, once the potential “prejudicial effect” had been similarly identified. *Handy* also finally gave due recognition to the “doctrine of chances” reasoning identified by the American jurist Wigmore a century earlier. These outcomes in both New Zealand and Canada are finally fused into a proposed statutory formula for the admission of “similar fact evidence properly so called”.

## **SIGNED CERTIFICATION**

This thesis is submitted to Bond University in fulfilment of the requirements of the Degree of Doctor of Philosophy.

This thesis represents my own original work towards this research degree, except where due acknowledgement is made, and contains no material which has been previously submitted for a degree or diploma at this University or any other institution.

David J Field

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To them both I acknowledge my grateful thanks, not only for their expert guidance and wise counsel, but also for their tact and diplomacy in suggesting endless amounts of much-needed editing, without which the end result would have been an ill-disciplined collection of volumes containing much unnecessary rhetoric and very little focus. The final thesis is still a long one, but hopefully one which suggests a navigable course through the rapids and torrents of two centuries of stormy water.

My other academic colleagues at Bond – not the least of whom is my son Iain, who demonstrated that it is possible to write a thesis while retaining one's sanity – may now take comfort in the fact that I will no longer be using them as sounding boards for novel, if obscure, concepts. My wife Virginia may now also have unlimited access to our home computer. To them all – thank you for putting up with my five year obsession.

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# Chapter 1:

## Thesis mission statement

### Chapter synopsis

Writing in 1956,<sup>1</sup> Cowan and Carter observed that:

The constant conflict between the desirability of admitting all evidence having probative value on the one hand, and the desirability of excluding all evidence of a prejudicial nature on the other runs through a large part of the law of evidence. The problem of the admissibility of similar fact evidence reveals this conflict in its most intense form.

This statement of the law both identifies the academic and legal mindset which has prevented “similar fact evidence” in its purest form from being admissible on its own terms, *and* reveals the primary reason for that.

‘Similar fact evidence properly so called’ , as I have chosen to call it,<sup>2</sup> has become conflated with *all* forms of evidence which suggest the propensity of an accused person to commit the crime of which they stand accused by reference to their behaviour on other occasions. There is justification for being apprehensive that a jury may make “too much” of the *mere fact* that an accused person has transgressed in some way in the past. At the same time, these concerns cannot justify the exclusion of

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<sup>1</sup> *Essays on the Law of Evidence* (1956), Clarendon Press, Oxford, p. 108.

<sup>2</sup> I have selected this phrase to describe the form of similar fact evidence which compares facts from other events involving an accused with those that are similar to the one(s) alleged at trial. It is, of course, an adaptation of Austin’s famous phrase “Laws properly so called” (See Austin, *The Province of Jurisprudence Determined* (Hart ed. 1954), p. 122).

evidence of such transgressions when they so closely replicate what the accused is alleged to have done on the instant occasion that it would be “an affront to common sense” to ignore them.

There is thus a strong need to distinguish similar fact evidence properly so called from all *other* forms of propensity evidence, identify the conditions precedent to its ‘safe’ admission, and establish a formula for such admission which all common law jurisdictions can adopt.

### **Similar fact evidence defined**

One of the best definitions of similar fact evidence is that supplied by Arenson,<sup>3</sup> namely that it is:

. . . . any evidence of specific conduct, usually criminal or otherwise discreditable in nature, that is of the same general characteristic or shares some *common* feature with the conduct which is the subject of the proceeding which is tendered as circumstantial evidence of one or more of the constituent elements of that conduct. [original emphasis]

### **Similar fact evidence properly so called is in a class of its own**

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<sup>3</sup> “Propensity evidence in Victoria: A triumph for justice or an affront to civil liberties?”, (1999) 26 Melbourne University Law Review, 263, at 265. See also Cowan and Carter (note 1), p. 110, who define it as “. . . evidence tending to show that the accused behaved on another occasion or on other occasions in a way to a greater or lesser extent similar to the way in which the prosecution alleges as part of its case that he behaved on the instant occasion”.

The search for a workable formula to govern the admission of similar fact evidence is not assisted by the looseness of language which is often employed to describe *all* circumstances in which previous misconduct by an accused might be considered admissible. The generic term for all such evidence is “propensity evidence”, which at its broadest was defined, in 2001,<sup>4</sup> as “. . . evidence of misconduct of the defendant on an occasion other than that leading to the charge.”

Such a simplistic generalisation masks the reality that similar fact evidence properly so called belongs in a class of its own, as a subset of “propensity” evidence as a whole. Unfortunately, a broader view has prevailed for many years, and evidence which truly reveals *factual similarities* between one event and another has become simply one manifestation of this broader concept of “propensity” evidence generally.

However, the tendency to conflate similar fact evidence properly so called with other forms of “propensity” evidence is still rife throughout the academic literature. For example, writing as recently as 2006,<sup>5</sup> perpetuated the confusion as follows:

The expressions “propensity evidence” and “similar fact evidence” are treated as equivalents, and are used to refer to all evidence which shows that on some other occasion the accused acted in a way more or less similar to the way in which the prosecution alleges the accused acted on the occasion the subject of the present charge. The expression “similar fact evidence” is used in the older cases and texts, while “propensity evidence” is favoured in more recent judgments.

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<sup>4</sup> This is the definition supplied by the English Law Commission in Summary Paper No 273 (9 October 2001), (Cm 5257), Para. 1.3.

<sup>5</sup> Waight and Williams, *Evidence: Commentary and Materials*, 7<sup>th</sup> ed (Law Book Company, Sydney, 2006), at p. 371. Compare this passage with its equivalent in the fourth edition of the same work (1995), in which this definition was applied, at p.387, to similar fact evidence *only*. See also the 8<sup>th</sup> Australian edition of *Cross on Evidence* (2010, edited by Heydon J of the High Court), Chapter 11 of which, dealing with *all* forms of propensity evidence, is headed “Similar Fact Evidence”. The equivalent work in England (Cross and Tapper, *Evidence*, 11<sup>th</sup> ed. 2007, OUP), at 404, fn.6, confirms that the traditional use of the generic term “similar fact evidence” to cover all forms of propensity evidence “. . . always was inappropriate, since it was used to describe the rule excluding evidence of the accused’s bad character by reference to the principal exception to that rule”.

It is fundamentally important to distinguish similar fact evidence from other, broader, forms of propensity evidence, because different criteria, based on different lines of logic, underpin the admissibility of each such form. *It is the mission statement of this thesis to underline and maintain that distinction, and to formulate a statutory provision to govern the admission of similar fact evidence properly so called.*

“Relationship” evidence, for example, is deemed admissible because of the light which it may be said to throw on the *background* to the event into which the instant court is enquiring. Whether it is the relationship between two accused persons,<sup>6</sup> or between the accused and their victim,<sup>7</sup> such evidence is said to possess probative value as part of “the full story” behind the alleged offence(s) on trial. A similar rationale underpins the probative value of so called “*res gestae*” evidence, which is either part of the offence itself, or is so intimately associated in some way with that offence as to be inseparable from it.<sup>8</sup> McHugh J, in *Harriman v R*,<sup>9</sup> said of such evidence that it:

... is so fundamental to the proceedings that its admissibility as a matter of law cannot depend upon a condition that its probative force transcends its prejudicial effect.

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<sup>6</sup> As, for example, in *R v Ball and Ball* [1911] AC 47 (the previous incestuous relationship between a brother and sister) and *Harriman v R* (1989) 167 CLR 590 (the prior relationship between two alleged drug dealers).

<sup>7</sup> The most common admission of this type of evidence is in proof of prior misconduct between an accused and their child sex victim, which is said to provide a “context” for the offending alleged on the indictment.

<sup>8</sup> See, for example, *O’Leary v The King* (1946) 73 CLR 566, where the murder of a man in a remote logging camp, and the drunken debauch which immediately preceded it, were described as “facts and matters which form constituent parts or ingredients of the transaction itself” (per Latham CJ at 575), as “one transaction” (per Dixon J at 577) and as “a series of connected occurrences” (per Williams J at 582).

<sup>9</sup> Note 6, at 633. He was referring to the test applied to similar fact evidence following *Boardman v DPP* [1975] AC 421 and *DPP v P* [1991] 2 AC 447. He was, of course, at the same time underlining the fact that relationship evidence and similar fact evidence properly so called are not the same thing.

Similar fact evidence properly so called proceeds along a different logical track to admissibility. The fact that the accused has, in the past, committed some act which is so closely linked factually to what they are now accused of, is admissible because of:

. . . its possessing a particularly probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused person in the offence charged.<sup>10</sup>

The distinction between *this* justification for admission, and that relating to other forms of propensity evidence, has been said to be:<sup>11</sup>

. . . a distinction between the *purpose* for which evidence of prior criminal acts is being tendered, as opposed to what it *discloses*.

“What it discloses” is, in simple terms, something that cannot be ignored in the interests of justice, if one is to allow common sense and the everyday intuitions of the triers of fact to be brought to bear on the evidence as a whole. In the words of the High Court in *Hoch v The Queen*:<sup>12</sup>

. . . the strength of its probative force . . . [is] such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.

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<sup>10</sup> *Pfennig v The Queen* (1995) 182 CLR 461, per Toohey J at 506.

<sup>11</sup> Bagaric and Amarasekara, “The Prejudice Against Similar Fact Evidence”, (2001) 5 International Journal of Evidence and Proof 71, at 73.

<sup>12</sup> (1988) 165 CLR 292, at 294-5, per Mason CJ and Wilson and Gaudron JJ.

Similar fact evidence properly so called occupies a distinctive place in the law of evidence. It renders more likely the fact that the accused was the offender on the occasion under investigation because it identifies some behaviour by the accused on *another* occasion which tends to confirm their involvement *this* time because they have displayed the *same* behaviour.

This in itself does not justify its admission without further consideration of the *commonality* of the two behaviours. The *mere fact* that the accused has, in the past, committed a crime of a broadly similar type is not, of itself, enough. It is the *particularity of detail* which renders the past behaviour admissible, when compared with the behaviour alleged on the instant occasion.

This particularity of detail has been given many descriptions, most notably in *R v Boardman*.<sup>13</sup> Lord Morris, for example, referred, in that case,<sup>14</sup> to “a close or striking similarity” and “an underlying unity”. Lord Wilberforce, in the same case,<sup>15</sup> also opted for “striking similarity”, while for Lord Hailsham,<sup>16</sup> the operative phrase was either “striking resemblances” or “unusual features”. Lord Cross,<sup>17</sup> identified “very striking peculiarities”, leaving Lord Salmon,<sup>18</sup> to opt for “uniquely or strikingly similar”.

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<sup>13</sup> Note 9.

<sup>14</sup> *Ibid*, at 441.

<sup>15</sup> At 445. The term “striking similarity” had already been coined, by Lord Goddard CJ in *R v Sims* [1946] KB 531, at 539. However, the House of Lords went on to warn in the later case of *DPP v P* (note 9, per Lord Mackay at 460) that one should not fixate on phrases such as “striking similarity”, because this “. . . is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it.” N.B. however, the observation by Mason CJ, Deane and Dawson JJ in *Pfennig* (note 10), at 484, that without such factors as “striking similarity, underlying unity and other like descriptions of similar facts . . . usually the evidence will lack the requisite force”. It is clearly the uniqueness of the factors for comparison which governs admissibility, not what name is applied to the phenomenon.

<sup>16</sup> At 454.

<sup>17</sup> At 460.

<sup>18</sup> At 462.

What each of these phrases describes is *a commonality of compared events* which cannot be ignored if one is to avoid “an affront to common sense”.<sup>19</sup> This commonality will “. . . point so strongly to . . . guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in the face of it”.<sup>20</sup>

The mere fact, for example, that an accused has raped before means nothing in itself. However, if, on that former occasion, he was dressed in a Harry Potter costume and persisted in calling his victim “Hermione”, and his latest alleged victim reports exactly the same bizarre and highly individualist behaviour, the commonality between the two scenarios cannot be ignored.<sup>21</sup>

In such cases, the “probative force” of the additional evidence:

. . . is derived . . . from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.<sup>22</sup>

Despite the need to avoid generalities in an area of law in which so much depends upon the facts of each case, it deserves emphasis that the logical attraction of

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<sup>19</sup> Per Lord Simon in *Reg. v Kilbourne* [1973] AC 729, at 759. In the Scottish case of *Moorov v HMA* 1930 JC 68, at 73, a similar reference by Lord Justice General Clyde was to “the connection between . . . separate acts (indicated by their external relation in time, character or circumstances) . . . such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind – but is related to – the separate acts.”

<sup>20</sup> Per Lord Cross in *Boardman*, note 9, at 457.

<sup>21</sup> For two additional, and characteristically graphic, hypothetical illustrations of the same principle in action, involving a burglar leaving an esoteric symbol written in lipstick at the crime scene, and a sodomite wearing a ceremonial Red Indian head-dress for the occasion, see Lord Hailsham in *Boardman* (note 9), at 454.

<sup>22</sup> Per Lord Wilberforce in *Boardman* (note 9), at 444. Once coincidence and collusion have been eliminated, the only possible conclusion is the guilt of the accused.

similar fact evidence varies according to whether or not it is already established that the previous behaviour was that of the accused. If so, then the comparison is between what they may be *proved* to have done in the past, and what they are *alleged* to have done on the occasion under enquiry. The stronger the factual symmetry between the previous and the instant behaviours, the more likely is the accused to have been the actor on the instant occasion.<sup>23</sup>

In the example given above of the ‘Harry Potter Rapist’, the factual symmetry between the two events leaves little doubt (absent the existence of a “copy-cat” rapist) that the now accused, who can be proved to have committed the first rape in a highly idiosyncratic way, was the rapist on the occasion now under enquiry. The *mere fact* that it was a rape does not distinguish the now accused from every other rapist; likewise, the mere fact that the previous rapist had a Harry Potter fixation means nothing unless that rapist may be shown to have been the accused.

When the accused does *not* admit their guilt of the behaviour which is being cited as probative of their guilt this time, or if it has only come to light for the first time in the context of the instant trial, then a different line of logic is employed, namely the elimination of coincidence. When such evidence takes the form of several victims of the same type of crime giving near-identical descriptions of the same behaviour, with no suggestion that they have colluded, then:

The probative value of the evidence lies in the improbability of witnesses giving accounts of happenings having the degree of similarity unless the events occurred.<sup>24</sup>

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<sup>23</sup> As Professor Rupert Cross put it, “. . . there comes a time when, assuming that the evidence is true, the hypothesis of the accused’s innocence of the offence charged places a very great strain on the credulity of the tribunal of fact” ([1973] Crim L R 400, at 401).

<sup>24</sup> Per Mason CJ, Deane and Dawson JJ in *Pfennig* (note 10) at 482.



As Hoffman put it,<sup>25</sup> by reference to the facts of *Makin*,<sup>26</sup> the significance of the discovery of so many dead infants in the gardens of properties formerly occupied by the accused was:

. . . . the statistical improbability that a number of children which the Makins have at various time had in their care would all have died of natural causes. From this it followed that they were likely to have been murdered.

### **Logic at the mercy of apprehended prejudice**

Unfortunately, the logical appeal of similar fact evidence is obscured by what may well be an unjustified fear that the tribunal of fact (usually a jury) will use it for the wrong purpose. This wrong purpose, it is argued,<sup>27</sup> is to conclude from the *mere fact* that the accused has, on another occasion, committed an offence (particularly an offence of a like nature to the instant one) that they are therefore more likely to have committed the one on the indictment. Statistically they *may* be, but this does not distinguish them from no doubt thousands of others who have committed the same type of offence in the past. Even worse is to conclude that, since they are a “criminal”, they should be convicted on this occasion, regardless of the strength of the direct evidence against them.

It is the ultimate submission of this thesis that if the admission of similar fact evidence is for the *correct* reason, by reference to the synchronicity of facts which has

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<sup>25</sup> “Similar Facts After Boardman”, (1975) 91 Law Quarterly Rev. 193, at 199.

<sup>26</sup> *Makin v Attorney-General for New South Wales* [1894] AC 57. See also *Smith v The Queen* (1915) 11 Cr App R 229, in which the inherent unlikelihood of three ‘wives’ of the accused succumbing to the same bizarrely unlikely bath-time mishap led to the inevitable conclusion that Smith had murdered them all.

<sup>27</sup> It was labelled “forbidden reasoning” by Lord Hailsham in *Boardman* (note 9) at 453. Studies have revealed that the temptation to fall into this error is greater if the prior behaviour is of the same generic type (e.g. burglary, rape or robbery) as that alleged on the indictment; see Sealy and Cornish, Wissler and Saks, and Lloyd-Bostock (all more fully cited in note 38).

already been described, then there is a reduced risk of the triers of fact using it for an *incorrect* one.<sup>28</sup> However, the risk of “forbidden reasoning” *is* more real when the type of propensity evidence which is being tendered takes some form *other than* similar fact evidence.<sup>29</sup> The long-standing failure to distinguish between the forms of propensity evidence identified above has led to similar fact evidence being drawn onto what was described, in *Boardman*,<sup>30</sup> as the “pitted battlefield” created by various attempts to rationalise, generalise, codify and generally make sense of the permitted grounds of admissibility of “propensity” evidence in *all* its forms.

For example, John is accused of the “stranger” rape of Janet, an adult female. Police search his house and discover material downloaded from the internet which depicts simulated acts of rape against both male and female victims, some apparently as young as ten. None of these fictional scenarios even remotely resemble the actions alleged against John, and the gender and age of the victims differ considerably from Janet. There is no logical reason for concluding from these facts that John was the one who raped Janet, but there is an obvious risk that if the jury is advised of the discovery of the internet material in John’s possession, it is more likely that he will be convicted. John may possess a ‘propensity’ or ‘disposition’ to be attracted to violent videos of a sexual nature, but the specific facts of the case do not justify the admission of that propensity into the evidential mix at the jury’s disposal.

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<sup>28</sup> As McHugh J expressed it in *Pfennig* (note 10), at 530, “In similar fact cases . . . evidence is often admitted for the reason that the association of the accused with so many similar deaths, injuries or losses . . . makes it highly improbable that there is any innocent explanation for the accused’s involvement in the matter. . . . In these cases . . . [t]he risk of prejudice is much less . . .”.

<sup>29</sup> The greatest risk of this arises when it is what Cowan and Carter (note 1, at p.110) describe as “evidence relevant via disposition”. By contrast, similar fact evidence discloses far *more* than mere disposition. Many people may have a disposition to be dishonest; what will distinguish one from another is the *nature* of their dishonesty (e.g. a fraudster will not normally commit armed robbery).

<sup>30</sup> Note 9, per Lord Hailsham, at 445.

The dilemma faced by courts when considering ‘evidence’ such as this was perhaps most succinctly described, by Stow,<sup>31</sup> in the following terms:

One of the distinctive features of the English law of evidence is the jealousy with which it protects an accused person from being harassed and prejudiced by questions regarding other offences committed by him<sup>32</sup>. . . . The common law rejects such evidence not because it is irrelevant (for logically it is relevant), but because an undue weight is allowed to it and it is misleading. Give a dog a bad name and hang him. . . . In some cases, however, to confine the evidence to the act charged would be to present a false picture to the jury.

When the additional evidence which the prosecution seeks to adduce takes the form of similar fact evidence properly so called, and appropriate safeguards are in place to ensure that it is being admitted for logically compelling reasons, then there is no need to lead it out onto the “pitted battlefield” at all. The fact that it *has* been in the past renders it even more imperative that similar fact evidence now be acknowledged for what it is – a logical adjunct to a strong prosecution case, with a reduced risk of it being used for inappropriate purposes, and therefore less reason for its exclusion.

*Once it is acknowledged that the admissibility of similar fact evidence depends upon its relevance, then the test of its admissibility becomes purely and simply a test of its relevance, without any corresponding need to weigh it in the balance against its alleged prejudiciality. If the relevance is strong enough, there is a greatly reduced likelihood that the jury will employ that evidence for any reason other than its relevance, provided that they are appropriately directed by the trial judge.*

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<sup>31</sup> “Evidence of Similar Facts”, (1922) 38 Law Quarterly Rev. 63.

<sup>32</sup> This was described by Viscount Sankey LC in *Maxwell v DPP* [1935] AC 309, at 317, as “. . . one of the most deeply rooted and jealously guarded principles of our criminal law”.

## Fundamental assumptions regarding juries

The root cause of the complexity of the law governing the admissibility of propensity evidence generally is the assumption that juries are incapable of either logic or sophistication. This is despite the fact that they *are* assumed to be capable of listening to and assimilating (often lengthy) conflicting testimonies from witnesses, absorbing directions in law from trial judges, then making decisions which will almost certainly affect at least one fellow citizen for the rest of their life. The irony of this has not gone unnoticed,<sup>33</sup> but nevertheless:

. . . . it is widely believed among prosecution and defence counsel alike that the revelation of the bad record of the accused has an effect on the jury disproportionate to its logical cogency.<sup>34</sup>

For this reason, evidence which is logically relevant is kept from juries out of fear that they will subject it to emotion and irrationality.<sup>35</sup> In accordance with this wider policy, propensity evidence generally has been required to pass through various sieves, the most recent, and most recondite, of which is that somehow “probity” should, and can, be measured against “prejudice”.

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<sup>33</sup> As Leubsdorf put it (“Presuppositions of Evidence Law” (2006), 91 Iowa L. Rev. 1209, at 1244), “. . . fact finding, which the law claims should be dispassionate and objective, is assigned to jurors whom the same law usually sees as emotional and unreliable”. As early as 1827, Jeremy Bentham was moved to enquire “Where is the consistency between this utter distrust of juries, and the implicit faith bestowed . . . on the decisions they are permitted to give on such evidence as they are permitted to receive?” [5, *Rationale of Judicial Evidence*, 15-16].

<sup>34</sup> Colin Tapper, (1973) 36 Modern Law Rev. 56. See also Pettys, “The Immoral Application of Exclusionary Rules” (2008) Wisconsin L. Rev. 463, at 492.

<sup>35</sup> “Trials search for truth by excluding certain truths” (Damaska, *Evidence Law Adrift*, (1997), p. 149.

While policy makers continue to debate the fallibility of jurors,<sup>36</sup> generations of psychologists and legal commentators have set out to test the hypothesis that they are unduly prejudiced by learning of an accused's criminal past, beginning with the famous Chicago Jury Project of 1953.<sup>37</sup> It is not germane to this thesis to report in detail on their findings, but on balance it would seem that there *is* good reason to believe that exposure to information that an accused person has discreditable items lurking in the closet of their life history enhances their chance of conviction by the triers of fact.<sup>38</sup>

Much of the negative response to these findings was based upon the fact that the "jurors" who were surveyed were inevitably *mock* jurors. However, in a recent meta-analysis of some three hundred *actual* trials across four large counties in the USA, legal scholars, statisticians and researchers, Eisenberg and Hans,<sup>39</sup> concluded that:

Juries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction. Use of prior-record evidence may therefore lead to erroneous convictions.

It is also part of the received wisdom in this area of law that judges – themselves usually experienced former trial lawyers – are immune from the seductive influence of

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<sup>36</sup> Even the English Criminal Law Revision Committee, in its Eleventh Report, "Evidence (General)" (1972, Cmnd. 4991), at para.76, was obliged to report that "We differ greatly among ourselves as to the extent of the danger that juries may be unduly affected by knowledge of other misconduct on the part of the accused . . . .".

<sup>37</sup> Devine et.al, "Jury decision making: 45 years of empirical research on deliberating groups", (2001), Psychology, Public Policy and Law, 7.

<sup>38</sup> See, for example, Sealy and Cornish, *Juries and the Rules of Evidence* (a report on the findings of the so-called "LSE Jury Project" in England), 1973 Crim L Rev 208; Doob and Kirshenbaum, "Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act upon an Accused", (1972) 15 Crim. L. Q. 88; Greene and Dodge, "The Influence of Prior Record Evidence on Juror Decision Making", (1995) 19 Law and Hum. Behav. 67; Hans and Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries", (1976) 18 Crim. L. Q. 235; Sally Lloyd-Bostock, "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study", 2000 Crim L R 734; Wissler and Saks, "On the Inefficiency of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt", (1985) 9 Law and Hum. Behav. 37.

<sup>39</sup> "Taking A Stand On Taking The Stand: The Effect Of A Prior Criminal Record On The Decision To Testify And On Trial Outcomes", (2009) 94 Cornell L. Rev, 1353.

learning of an accused's discreditable past.<sup>40</sup> While this has yet to be proved or disproved,<sup>41</sup> it has been the somewhat disturbing conclusion of those who have conducted comparable research among lay magistrates that they are no better than juries at putting aside any prior knowledge they may have of an accused's past when assessing their guilt.

For example, when Sally Lloyd-Bostock replicated part of her jury study,<sup>42</sup> this time with English lay magistrates,<sup>43</sup> she discovered the same tendency that she had noted with jurors to rate the likelihood of guilt as higher when the accused had a prior criminal history. Coupled with this is the inevitability that a lay magistrate sitting regularly in a busy court will be very familiar with the criminal records of some of their 'regulars'.<sup>44</sup>

There would therefore seem to be some justification for the observation by Lord Widgery CJ, in *Wetherall v Harrison*,<sup>45</sup> that:

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<sup>40</sup> See Leubsdorf (note 33, at 1254), who asserts that "...the procedural system in which judges rule on what the jury will hear implies a judicial posture of superior cognitive ability and greater freedom from bias".

<sup>41</sup> N.B. however the alarming conclusions of a study by Blanck et.al. ("The Appearance of Justice: Judge's Verbal and Nonverbal Behaviour in Criminal Jury Trials", (1994) 38 Stan. L. Rev. 89), to the effect that trial judges who were aware that the accused had a prior criminal history displayed "distinctive nonverbal behaviour" when directing the trial jury. Wistrich et. al. also conducted research among judges awarding damages in civil actions to see if they could be influenced in their awards by knowledge of the criminal history of the plaintiff; they concluded (in "Can Judges Ignore Inadmissible Information?" (2005), 153 U. Pa. L. Rev. 1251, at 1308), that "... judges were affected by the evidence that they themselves had ruled inadmissible".

<sup>42</sup> Note 38.

<sup>43</sup> "The Effects on Lay Magistrates of Hearing That the Defendant Is of "Good Character", Being Left to Speculate, or Hearing That He Has a Previous Conviction", 2006 Crim L Rev 189.

<sup>44</sup> See Darbyshire, "Previous Misconduct and Magistrates' Courts – Some Tales from the Real World", (1997) Crim L R 104, at 107.

<sup>45</sup> [1976] 1 All E.R. 241, at 244. The case actually concerned whether or not a lay magistrate who was also a doctor should have advised his fellow magistrates of the nature of "needle phobia" in a case involving a suspected drunken motorist who had refused to supply a blood sample.

“Laymen . . . sitting as justices . . . lack the ability to put out of their minds certain features of the case . . . In a sense the bench of justices is like a jury . . .

This was taken as a universal truth by the Law Commission in its Discussion Paper on “Prior Misconduct”,<sup>46</sup> which in its deliberations referred throughout to “juries and magistrates”, without distinguishing between them regarding their susceptibility to the influence of learning of the criminal history of an accused. Certainly, it would seem that perhaps even in the case of legally trained and trial-experienced judges we should not:

. . . quickly assume that judges can transcend those perceived cognitive and decisional failings of jurors that inspired the law of evidence in the first place.<sup>47</sup>

### **Similar fact evidence avoids these issues**

When one examines more carefully these “cognitive and decisional failings”, it may be seen that they can be largely discounted in respect of similar fact evidence admitted for the correct reason, with direction from the trial judge against using it for any *other* reason. This is because these failings arise from the effect of being told simply that the accused *has* a criminal past, and not how *similar in points of detail* their past activities are to what is now being alleged against them.

The first cognitive error on the part of those laymen open to the seductive effect of being told of an accused’s discreditable past is the assumption that “leopards never change their spots”. This is put in more academic terms by psychologists, who refer to

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<sup>46</sup> (1996), paras. 7.2 – 7.20.

<sup>47</sup> Schauer, “On the supposed jury-dependence of evidence law”, (2007) 155 U. Pa. L. Rev. 165.

“trait” theory.<sup>48</sup> This, in turn, may be described as an underlying belief in the consistency and stability of a person’s behaviour and personality, such that it may confidently be predicted that a person who has behaved in a certain way in the past may be expected to behave in the same way in the future.<sup>49</sup>

Over the years, this has been challenged by other psychologists who subscribe to the theory that criminal behaviour is “situational”, that is, dependent entirely on circumstances.<sup>50</sup> As pointed out by Stanford University Law Professor Miguel Mendez,<sup>51</sup>

These findings threaten the common law’s basic assumptions about the probative value of character evidence. If even seemingly trivial situational differences can render behavioural predictions totally invalid, then character evidence may possess little or *no* probative value. (original emphasis).

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<sup>48</sup> It has also been labelled “fundamental attribution error”; see Ross, “The intuitive psychologist and his shortcomings: Distortions in the attribution process”, in Berkowitz (Ed), *Advances in experimental social psychology* (Vol.10, New York: Academic Press)(1977), pp. 174-221.

<sup>49</sup> See, for example, Kassin (1995) *Psychology* (Boston, Houghton Mifflin Company); Morris and Maesto, *Psychology: An introduction* (12<sup>th</sup> ed. 2005) (New Jersey, Pearson Prentice Hall); Myers, *Psychology* (1998, 5<sup>th</sup> ed) (New York, Worth Publishers). For legal commentary on the same phenomenon, see Cowan and Carter (note 1), pp. 144-5; Imwinkelreid, “The Use Of Evidence Of An Accused’s Uncharged Misconduct To Prove Mens Rea: The Doctrines Which Threaten To Engulf The Character Evidence Prohibition”, (1990) 51 Ohio State Law Journal 575, at 581-2; Palmer, “The Scope of the Similar Fact Rule”, (1994) 16 Adelaide Law Review 161, at 169.

<sup>50</sup> Exemplars of this school of psychology include Hartshorne and May, (1928), *Studies in the nature of character: Vol.1. Studies in deceit* (New York, MacMillan), who argued, at p. 243, after conducting a series of subject studies, that the so-called “trait” of “dishonesty” was in fact “. . . a group of highly situational habits that consisted of a series of specific responses to specific situations” (for example, that a person who is likely to steal is no more likely to tell a lie, and vice-versa). See also Mischel (1968), *Personality and assessment* (New York, Wiley), at p. 146, that “. . . highly generalized behavioural consistencies [have been proven to be] undemonstrated”, and at p.37, that “. . . behaviours which are often construed as stable personality indicators are actually highly specific and depend on the evoking situation.” Even a leading criminal profiler has been obliged to concede that “. . . situational factors need to be considered to get a full understanding of the person . . . behaviour must be viewed in context” (Turvey, *Criminal profiling. An introduction to behavioural evidence analysis*, (1999) California, Academic Press).

<sup>51</sup> “California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies”, (1984) 31 U.C.L.A. L. Rev. 1003.



However, jurors who have not made a detailed study of recent psychological literature are *still* likely to make too much of the *mere fact* that an accused person has a discreditable past. This is the result of yet more “cognitive” failings or “intuitive” thought processes, *all of which are side-stepped if similar fact evidence is admitted for the right reasons.*

These inappropriate thought processes were summarised by McHugh J in *Pfennig*.<sup>52</sup> Apart from the assumption of consistent behavioural traits referred to above, his Honour referred to the tendency to draw too strong an adverse conclusion from the “improbability of sequences”,<sup>53</sup> and the “moral prejudice”,<sup>54</sup> which a jury may experience against an accused who is shown to have engaged in the past in behaviour (such as child molestation) which excites strong antipathy. To these, the psychologists have added what they refer to as the “reverse halo effect”,<sup>55</sup> under which one or more known adverse facts about a person tempt the fact-finder to make a disproportionate judgment about the *rest* of their character, including their guilt of the crime on trial.<sup>56</sup> Then there is what has been termed “the regret matrix”, under which jurors have less reluctance to convict someone who already has a criminal history, and even less if another crime has been revealed for which they have not yet been punished.

All of these powerful reasons for taking exceptional care before admitting evidence of an accused’s criminal history, and balancing its “probative value” against its “prejudicial effect”, are redundant when the reason for admitting that criminal history is that it is probative for the *correct* purpose, a purpose which at the same time severely reduces the risk of subconscious prejudice, *provided that the jurors are*

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<sup>52</sup> Note 10, at 512-13.

<sup>53</sup> This is what occurred in *Perry* (1982) 150 CLR 594, when the mere occurrence of a series of apparent deaths from arsenic poisoning were assumed to be non-coincidental because the accused had provided all the meals in the house.

<sup>54</sup> His Honour did not employ this term, which has been adopted from the English Law Commission’s Consultation Paper of 1996 (“Evidence in Criminal Proceedings: Previous Misconduct of a Defendant”; Consultation Paper no.141).

<sup>55</sup> Mendez (note 51), at 1047, called this the “devil’s horns effect”.

<sup>56</sup> See Hans and Doob, note 38, at 237-238.

*carefully directed by the trial judge on the precise purpose for which the evidence is being admitted, and the unacceptability of using it for any other purpose.*

The “correct purpose” referred to above is the factual commonality between the cited and alleged behaviours; in short, the *relevance* of the past behaviour to what is being newly alleged. As Redmayne put it:<sup>57</sup>

The intuition behind the similar fact rule is that the probative value of the previous convictions depends on their degree of similarity to the present charge.

### **The thesis which follows**

In the chapters which follow, it will be demonstrated precisely *why* similar fact evidence properly so called is in a category of its own, and why it should never have been conflated with other forms of propensity evidence with which it has nothing in common. The subjection of similar fact evidence properly so called to the “probity versus prejudice” mantra has served to obscure its unique logical claim to admission. The baby has not so much been thrown out with the bath-water as *drowned* in it.

It will be argued that the lack of success of all previous attempts to either rationalise or codify the common law approach to propensity evidence can be ascribed to this failure to distinguish between one form of it and another. To continue the analogy, the bathwater has become so murky that it is impossible to distinguish anything in it. If similar fact evidence properly so called is to be restored to its deserved role in the criminal justice process, the grounds upon which it is admitted must be clearly identified, and insulated from the confusion which has been allowed to obscure

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<sup>57</sup> “The Relevance of Bad Character”, (2002) Cambridge Law Journal, 61(3), 684 at 691.

all other forms of the broad genus of “propensity” evidence, of which similar fact evidence properly so called is only one species, albeit the purest.

## Chapter 2:

### The English years before *Makin*

#### Chapter synopsis

By 1894, when Lord Herschell read the seminal judgment of the Judicial Committee of the Privy Council in *Makin v Attorney-General of New South Wales*,<sup>58</sup> it had become so commonplace for the prosecution to be allowed to adduce evidence of the previous ‘bad acts’ of an accused person that, in one sense, nothing new was being handed down.<sup>59</sup> The significance of *Makin* was that it constituted the first attempt to induct a general principle from what had hitherto been a collection of individual decisions handed down to meet specific factual situations.

As these pre-*Makin* cases demonstrate, the relevance of an accused person’s proven prior bad acts to the allegations against them on the instant occasion became recognised in respect of several different types of crime throughout the Nineteenth Century. However, there was, as yet, little acknowledgment of the corresponding potential prejudice which this could have on an accused’s chances of acquittal. Nor was there any suggestion that admitting such evidence might result in an “unfair” trial.

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<sup>58</sup> [1894] AC 57.

<sup>59</sup> There is a body of academic opinion to the effect that prior to *Cole* (note 118), there was in fact *no* general ban on the use of bad act evidence against a criminal accused; see, for example, Wigmore, *Evidence in Trials at Common Law*, (3d ed.1940 – hereafter ‘Wigmore 3’), § 923, at 450 (“Historically, the use of bad general character appears as generally allowable”); Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), at 525 (“This rule is modern. In earlier times such evidence was freely used in our courts . . . ”); Julius Stone, “The Rule of Exclusion of Similar Fact Evidence: England”, (1933) 46 Harv. L.Rev. 954, at 957 (“An examination of the early text-writers fails to reveal any recognized rule excluding evidence of similar facts”). It was in fact Stone (at 960) who cited *Cole* as the case which first established that the demonstrated propensity of an accused, in the past, to perform the criminal acts of which they were freshly accused was inadmissible.

Although occasionally,<sup>60</sup> a trial judge admitting such evidence might do so with an expression of regret, such regret was in respect of the accused being taken by surprise by the need to defend against more charges than they had come to court prepared to defend.<sup>61</sup> There was no suggestion, in these early cases, that “unfairness” to an accused, or the risk of the evidence being considered by the jury for the “wrong” reason, ought to be balanced against the probative strength of the bad act evidence in the context of the case as a whole. It all, initially, depended upon *relevance*.

The development of the law along new lines during the Nineteenth Century, recognising the need for the Crown to justify the admission of bad act evidence, reflected the role played by precedent during those formative years. The common law of England had grown – and continued to grow – by reference to what had gone before.<sup>62</sup> Our contemporary legal environment of regular and reliable reporting was still in its infancy, as was the fully developed principle of *stare decisis* which depended upon it, but trial judges were already fully aware of the need to follow what had been laid down in previous cases. The first generation of trial judges to be confronted by prosecution requests to admit bad act evidence against an accused, following the apparent change of a policy which had hitherto admitted it without question, sought guidance from the isolated previous decisions of their brethren, and granted leave only when it was regarded as established by precedent.

By this means, “similar fact evidence”, as it became known, developed “inductively”.<sup>63</sup> For example, once it had become generally accepted that “guilty

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<sup>60</sup> One example was *Flannagan and Higgins*; see note 111.

<sup>61</sup> As late as 1904, in the first edition of his influential treatise cited in note 59 (hereafter ‘Wigmore 1’), § 216, at 265, Wigmore regarded taking the accused by surprise as the “chief reason” for excluding bad act evidence.

<sup>62</sup> See, for example, Milsom, *Historical Foundations of the Common Law*, (Butterworths, London, 1969), p. 260.

<sup>63</sup> As Lord Asquith put it, in *Chapman v Chapman* [1954] AC 429 at 470; [1954] 1 All E R 798 at 819; “. . . English jurisprudence starts with a clean slate, scored over, in course of time, with *ad hoc* decisions. General rules are arrived at inductively, from the collation and comparison of these decisions”. The development of the law on “similar fact evidence” was no different.

knowledge” might be proved against a person accused of forgery and uttering by means of evidence of their similar actions in the past, analogy reasoning was employed in order to justify the admission of the same sort of evidence in trials for receiving stolen property.

The development of the law by means of the “case method” tends to be tentative and piecemeal, and as the Nineteenth Century moved on, the confidence with which counsel on both sides argued for and against the admissibility of a particular item of ‘other act’ evidence varied according to the clarity of the established precedents, rather than either the logic or the justice of admitting the evidence in the instant case. Since these precedents were seen as having been established by reference to the *type* of case involved, there was no simultaneous recognition that in most cases, it was the *factual synchronicity* between the cited behaviour and that alleged in the new case which demanded the admission of the challenged evidence.

Nevertheless, a study of these early cases reveals a subtly developing rationale for the admission of such evidence. This depended, not so much on inferences from the established propensity of an accused to commit a particular type of crime, as upon the *similarity* of the two compared behaviours, which made the prior behaviour *relevant* to that alleged on the instant occasion. By the date of *Makin*, it was simply a matter of ‘joining up the dots’, and formulating an over-arching principle based on *relevance to an issue before the jury*.<sup>64</sup>

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<sup>64</sup> The modern American commentator David P Leonard (in *The New Wigmore. A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* (2011), Aspen Publishers, USA – hereafter ‘Leonard’), at §1.1, describes the rule thereby developed as one “. . . not restricting admissibility of the evidence if the evidence might be relevant based on reasoning that does not require an inference as to character”.

## Factual ‘cluster groups’

The pre-occupation, pre-*Makin*, with the need to justify the admission of what may be generically described as ‘bad act’ evidence against an accused by reference to clear precedent resulted in the development of what might be termed ‘factual cluster groups’ of cases, in which the allegations against the accused were essentially the same as in previous cases, and might therefore be admitted without risk of error. This process began with the offence of forgery, spread into other forms of dishonesty, then travelled, via abortion and sexual offences, to allegations of homicide. Thus, by the date of *Makin*, a factual precedent was available, upon which the Judicial Committee would construct a broader principle.

### *Forgery and uttering*

The earliest reported Nineteenth Century case on the use of bad act evidence against an accused,<sup>65</sup> was in relation to an allegation of forgery and uttering. Two women had attempted to pass a forged banknote to a shopkeeper, and claimed at trial that they had done so innocently. This defence was rebutted by evidence of prior occasions upon which they had been apprehended for similar attempts, and had given false names and addresses. When their counsel objected to the admission of this evidence on the basis that it was not directly relevant to the charges on the indictment, Chief Justice Ellenborough referred, in his judgment,<sup>66</sup> to a decision, a few years earlier,

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<sup>65</sup> *The King v Sarah Whiley and Ann Haines* (1804) 2 Leach 983.

<sup>66</sup> At 985-6. Heath J, at 986, observed that “. . . as [the guilty] knowledge cannot be collected from the circumstances of the transaction, it must necessarily be collected from other facts and circumstances”. Leonard (note 64), at §7.4, cites this as a ruling based on “necessity”. Baron Thompson, *ibid*, was satisfied simply that “The case of *Rex v Tattershall* is exactly in point”.

<sup>67</sup> by “the Twelve Judges”, and previous cases over which he had presided, as his authority for concluding that:

... it is competent for the Court to receive evidence of other transactions, though they amount to distinct offences . . . from which it may be fairly inferred that [the accused were] conscious of [their] guilt while . . . doing the act charged upon [them] in the indictment . . . .

“The Twelve Judges” were consulted again three years later by Heath J in *R v Edward Ball*,<sup>68</sup> a case almost identical on its facts to *Whiley and Haines*. Their response was that the evidence of B’s prior uttering of similar forged banknotes in the six months prior to the date of the offence charged on the indictment had been rightly admitted, and Heath J added that “. . . there can be little doubt of the propriety of receiving it”.<sup>69</sup>

In a series of cases which followed, it was obvious that the precise logical basis for the admission of bad act evidence in such circumstances remained obscure. Compare, for example, *Rex v Taverner*,<sup>70</sup> and *Rex v Thomas Smith*,<sup>71</sup> in both of which the emphasis was on the need for factual similarity between the similar fact evidence which it was sought to lead, and the new allegations against the accused, with *Regina v Salt*,<sup>72</sup> in which the significance of the similar fact evidence was said to be its relevance to “an issue” in the case in hand.

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<sup>67</sup> The case was referred to as *Tattershall’s Case*, and it was said to have been heard in 1801. However, there is no citation for the case in *Whiley and Haines*, and it is has been concluded by the author that *Tattershall’s Case* was never officially reported.

<sup>68</sup> (1807) 1 Campbell 324.

<sup>69</sup> At 326.

<sup>70</sup> (1809) Carr.Supp. 195, reported second-hand in a footnote to *Smith* (see note 71).

<sup>71</sup> (1827) 2 Car. & P. 633.

<sup>72</sup> (1862) 3 F. & F. 834.



Just over a decade before *Makin*, it finally emerged that what was being proved when the Crown was allowed to adduce evidence of prior forgeries and utterings was the existence of a “system” employed by the accused, which had *also* been employed on the occasion specified on the indictment. *Regina v Colclough*, an Irish case,<sup>73</sup> was factually complex, and essentially involved an allegation that C had forged and uttered a stamped court document. His defence was that either an employee of his had deliberately carried out the deception, or that he (C) had committed the act innocently.

In rebuttal, the Crown had been allowed to adduce evidence of the discovery, in C’s office, of a “vast number” of identically forged forms. On appeal, that decision was upheld,<sup>74</sup> on the ground that the evidence was admissible “. . . as evidence of guilty knowledge”. While the term “system” was not employed anywhere in the judgment, the reasoning was clearly to the effect that when one considered *the facts as a whole*, it was proved that C was engaged in a continuous process of generating forged documents which were then uttered as genuine, and that the individual form which was the basis of the charge had been generated as part of that same system. In those circumstances, C could hardly claim that it had happened by innocent accident, or via the hand of another person.

There were two ways of explaining the relevance of the evidence which had been admitted. The first was that C was engaged in a systematic scheme of fraudulent behaviour involving documents of that kind. The second was that his possession of blank forgeries was so factually relevant to his alleged uttering of the forgery on the indictment that the only conclusion which could be drawn from all the facts, taken together, was that the offence alleged on the indictment was one instance of a wider pattern of criminality involving the forgery and uttering of such documents.

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<sup>73</sup> (1882) 15 Cox C.C. 92. At that date, Irish courts were still subject to English law.

<sup>74</sup> At 97-8, per Harrison J.

The failure to make this distinction allowed the case to serve as a precedent for admitting such evidence for the *purpose* of proving “system” or “guilty knowledge”. While this might have been justified on the facts of that case, the general principle thereby established might not be valid in respect of other cases in which the factual synchronicity was not so compelling.

As the result of the failure to make that distinction, and on the eve of *Makin*, the Chief Justice of the day was able to refer,<sup>75</sup> in the context of yet another forging and uttering case, to:

. . . . the rule – now well established – that acts done by a prisoner of the same character as the acts charged in the indictment are, within reasonable limits, admissible in evidence in order to prove his guilty knowledge.

It appears that what had once been an exclusionary rule had now become an inclusionary one if “guilty knowledge” could be proved by the admission of such evidence. A similar new “rule” had also become established, in other factual contexts, in order to prove “system” on the part of an accused.

### *Other offences of dishonesty*

Once it had become judicially accepted that it was appropriate to admit evidence of an accused person’s previous apparent dishonesty in relation to fresh allegations of forging and uttering – in rebuttal of any suggestion of innocent mistake on their part – legal argument turned to whether or not, by analogy, the same process might be

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<sup>75</sup> Coleridge CJ, in *The Queen v Gibson* (1887) 18 Q.B.D. 541.

acceptable in respect of other offences in which the *bona fides* of an accused might be an issue for consideration by a trial jury.

One of the first of these extensions to the established precedent arose in *The King v Ellis*,<sup>76</sup> in which E, a shop assistant, was found guilty of stealing six shillings in marked coins from his employer's till. The marked coins had been planted there when E fell under suspicion, and E had been covertly watched by the employer's son, who checked the till from time to time. On the first occasion, two shillings was found to be missing, but when the son went on to testify regarding the subsequent thefts, it was over a defence objection that one offence had already been described, and that the witness ought not to be allowed to testify regarding any more. On appeal, the resulting conviction was allowed to stand because:<sup>77</sup>

. . . . where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other.

This constituted a subtle change in the rationale for admission. Whereas in the early forgery and uttering cases, admissibility had been said to be on the basis of “guilty knowledge” when two or more incidents were factually linked, these incidents were now being considered as an “entire transaction”,<sup>78</sup> which would soon come to be expressed as “a single course of criminal conduct”, or a “dishonest system”, engaged in by the accused.

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<sup>76</sup> (1826) 6 B. & C. 145.

<sup>77</sup> Per Bayley J, at 147-8.

<sup>78</sup> In *Rex v Birdseye* (1830) 4 C. & P. 386, the term “one continuing transaction” was employed by Littledale J, while Erle J referred to “one entire transaction” in *Regina v Bleasdale* (1848) 2 Car. & P. 765 at 766. This was held to be the test in *Rex v Davis and Another*, 6 C. & P, even though the entirety of the goods stolen (from the same victim) were charged, item by item, on separate indictments, but the Crown insisted on leading the evidence of the victim, in each case, in proof of the theft of the *total*.

This change of rationale opened the door to admissibility based on factual links which were broader-based than had originally been thought acceptable as evidence of dishonesty, and focused more on the *purpose* for which the evidence was admissible. Thus, in *R v Dunn*,<sup>79</sup> it was held that on the trial of a person for receiving stolen property, evidence might be given of the receipt by the accused of other stolen items given to her by the same thief on a date or dates prior to that on the indictment.<sup>80</sup> In *R v Mansfield*,<sup>81</sup> it was held that on an indictment charging the theft of a quantity of tin, a constable might testify that he came across the tin in the possession of the accused when he called at his premises to search for stolen iron.<sup>82</sup>

*Dunn, Davis and Another* and *Mansfield* were all cited by Crown Counsel in *Reg v Oddy*,<sup>83</sup> in which O was tried on an indictment which contained three counts arising from a break-in at a wool warehouse on a given date. These were (a) breaking and entering and stealing a quantity of cloth; (b) stealing the cloth; and (c) receiving the cloth knowing it to have been stolen. There is no indication from the case report that these charges were in the alternative, but in respect of each of them the Crown succeeded in adducing evidence that on two subsequent occasions O had been found in possession of a total of four pieces of cloth which had been stolen three months previous to the date of the break-in specified in the indictment, and *from another woollen mill entirely*.

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<sup>79</sup> Moo. C.C. 146. The case report does not reveal the precise year, but by inference it was prior to 1851.

<sup>80</sup> This was presumably justified as showing a “course of conduct” on the part of the accused. In fact, it did not depend upon any narrow factual similarity between the misbehaviours, but merely revealed the accused to be of a dishonest propensity generally. Once again, focus was on the *purpose* for admitting the evidence, and not its *logical factual relevance*. Insofar as it established the accused’s alleged guilty association with a known thief, it was perhaps best characterised, in modern terms, as “relationship” evidence.

<sup>81</sup> Car. & M. 140. Again, a process of elimination dates this case as being between 1840 and 1842.

<sup>82</sup> It is not clear whether or not any stolen iron was actually found. Once again, a case of “Once a thief, always a thief”, admitted to prove dishonest character by means of questionably relevant evidence.

<sup>83</sup> (1851) 5 Cox C.C. 210.

O was acquitted of the first two charges, and his appeal against his conviction on the third – receiving – charge related to the admissibility of the evidence relating to his possession of the cloth linked to the previous break-in. The conviction was quashed on appeal because:<sup>84</sup>

It would be evidence to prove that the prisoner is a very bad man, and likely to commit such an offence; but . . . How can the possession of other stolen goods show any knowledge that the particular goods mentioned in the indictment were stolen?

The implication was that the similar fact evidence was insufficiently linked to the fresh allegation in any *factual* way which made it possible to conclude that both events were part of the same “course of conduct” or “continuing transaction”. Baron Alderson,<sup>85</sup> was even more pedantic in his observation that whereas in ‘uttering’ cases, the *same sort* of behaviour is being alleged on each occasion, in this case the previous action by the accused might have constituted stealing, which is not the same thing as receiving stolen property.

This splitting of hairs completely overlooked the arguable conclusion that O had been engaged in an unlawful scheme involving cloth stolen from local warehouses.<sup>86</sup> But the “dishonest scheme” rationale was re-affirmed in *Regina v Richardson*,<sup>87</sup> in which R was accused of embezzling his employer’s money in his capacity as a clerk by fraudulently misrepresenting the amount he had expended on the employer’s behalf.

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<sup>84</sup> Per Lord Campbell, at 215. The point was clearly being reaffirmed that without some factual link supplying the necessary relevance, the challenged evidence simply went to show the accused as dishonest generally.

<sup>85</sup> *Ibid.*

<sup>86</sup> The same refusal to look at the broader picture was also evident in *Reg v Holt* (1860) 8 Cox C.C. 411.

<sup>87</sup> (1860) 2 F. & F. 343.

These ‘offences’ might have been explained away as simple arithmetical errors, and the Crown accordingly sought leave to admit evidence of a series of similar misrepresentations, both before and after the dates of those on the indictment, in anticipation of a defence of “accident”, over a defence objection,<sup>88</sup> that “ . . . the evidence must be confined to the point in issue . . . . the only exceptions being . . . on indictment for conspiracy, for uttering, or for receiving stolen goods”.

The trial judge, Williams J, admitted the evidence on the ground that:<sup>89</sup>

. . . this evidence is admissible . . . in accordance with the principle laid down in numerous cases . . . to explain motives or intention . . . . although it does not otherwise bear upon the issue to be tried.<sup>90</sup>

Such was the confidence with which the legal world adhered to the principle expounded by his Lordship in this case that only a decade later it was incorporated into the *Prevention of Crimes Act 1871*, (E. & W.), s 19,<sup>91</sup> which provided that in connection with any trial for receiving or possessing stolen property, the Crown might lead evidence of prior occasions within the previous twelve months upon which the accused had been found in possession of other stolen property, in order to prove guilty knowledge.

The validity of employing evidence of similar events in an accused’s past in order to prove a “course of criminal conduct”, or “system” which encompassed the offence on trial was re-affirmed in a seminal pre-*Makin* decision in relation to an

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<sup>88</sup> At 345. Note the attempt to restrict admission to certain *types* of case in which there were clear precedents.

<sup>89</sup> At 346. *Clewes* (note 96) was cited in support. His Lordship claimed also to have acquired the agreement of the Chief Baron, whom he had consulted before making his ruling.

<sup>90</sup> This is another clear example of the swing away from the need to show factual similarity, towards the admission of evidence for a ‘purpose’ for which a precedent has already been established.

<sup>91</sup> It was subsequently repealed by the *Larceny Act 1916* (E. & W.).

offence of dishonesty. In *Reg v Francis*,<sup>92</sup> F was charged with two counts of attempted false pretences in respect of his attempted pawning of a worthless ring which he had sought to pass off as a diamond ring. F's defence was essentially innocent mistake, or absence of guilty knowledge, in rebuttal of which the Crown had been allowed to adduce the evidence of three other pawnbrokers to whom F had made false representations regarding the value of different items he was attempting to pawn.

On his appeal against conviction, F's counsel argued,<sup>93</sup> not only that the evidence had been prejudicial against F, and had been led without sufficient notice to allow F to fairly defend himself against it, but that "Evidence of this kind has heretofore been usually confined to cases of passing counterfeit coin and forged bank notes".

The Crown appears to have been sufficiently confident of its case that it did not instruct counsel to appear on the appeal, and the judgment of the Court was delivered by Lord Coleridge, C.J.,<sup>94</sup> who ruled that:

It seems clear upon principle that. . . evidence of the class received must be admissible. It tends to show that [F] had been pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive; for a man may be many times under a similar mistake or may be many times the dupe of another. But it is less likely he should be so oftener than once,<sup>95</sup> and every circumstance which shows that he was not under a mistake on any one of these occasions strengthens the

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<sup>92</sup> (1874) 12 Cox C.C. 612. See also *The Queen v Cooper* (1875) 1 Q.B.D. 19, for a similar ruling, in which almost 300 letters of reply to a fraudulent newspaper advertisement inserted by C were admitted in evidence, in order to prove C's 'system' for obtaining small sums by way of misrepresentation.

<sup>93</sup> At 614-5, citing *Russell on Crimes* (3<sup>rd</sup> ed.), at 127 for the second assertion. It is also indicative of the growing generality of the practice of admitting bad act evidence against an accused that counsel was also able, somewhat inconsistently, to cite *Reg v Gray* (note 116), an arson case, and *Geering* (note 99), a murder case, in both of which such evidence had been admitted.

<sup>94</sup> At 615-6.

<sup>95</sup> This was perhaps the first faint stirrings of what later became known as "coincidence reasoning" – see *Smith*, note 26. It is also a clear early example of repeated events being employed to *eliminate coincidence*, which is one of the justifications for the admission of 'similar fact evidence properly so called' which is advocated in this thesis.

presumption that he was not on the last. . . . The cases in which this had been acted on are most commonly cases of uttering forged documents or base coin, but they are not confined to those cases.

### *Homicide*

Previous ‘bad act’ evidence was also being tested out in homicide cases. One of its earliest applications was in *R v Clewes*,<sup>96</sup> when the Crown, in proof of C’s guilt of the murder of H, was allowed to introduce evidence of C and H’s joint complicity in the earlier murder of P in order to demonstrate C’s motive for wanting H dead.<sup>97</sup> This evidence owed its relevancy as much to the evidence being part of the *res gestae* of the murder of H as it did to any prior indication of C’s capacity for murder.

Whatever the precise rationale for the admission of evidence of C’s prior involvement in a murder which was not directly related to the one on the new indictment, it was clearly demonstrated that courts would not shrink from admitting evidence which was relevant to the matter in hand even though it might cast the accused in an unfavourable light.<sup>98</sup> This adherence to relevance over prejudice was demonstrated once more in *Geering*,<sup>99</sup> in which G was tried for the murder of her husband by arsenic poisoning administered in food she had cooked. Evidence was admitted, by the trial judge,<sup>100</sup> of the subsequent poisoning of two sons of the accused in what appeared to be identical circumstances.

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<sup>96</sup> (1830) 4 Car. & P. 221.

<sup>97</sup> H had in fact been detected as the murderer of P, and C was apprehensive that H would implicate him. Were this case to be replicated in a modern context, one might justify the admission of this aspect of the evidence on the ground that it demonstrates the “relationship” between the accused and his victim.

<sup>98</sup> It was this aspect of the case which led to its being cited by the Crown in *Oddy* (note 83) and *Richardson* (note 87), which were both cases of dishonesty, and *Dossett* (note 115), an arson case. The underlying principle of ‘relevance’ was rapidly crossing the narrow boundaries of offence *type*.

<sup>99</sup> 18 L.J. (N.S.) (M.C.) 215. At the time of writing, the author has not been able to access the original report, but this summary of the case has been compiled from references to it located in other, later, reports.

<sup>100</sup> Pollock, C.B., in order to rebut any suggestion of accident in the murder of the husband. He regarded it as “wholly immaterial” whether the sons died before or after the husband. Again, it has to be noted that the failure to cite the factual synchronicity of the incidents as the basis for their relevance served to



However, in a subsequent case with comparable facts,<sup>101</sup> the Crown's attempt to employ evidence of similar prior deaths in order to eliminate both "accident" and "alibi" defences was rejected by the trial judge following a submission by defence counsel that:

... whatever effect the proposed evidence might have in a moral view,<sup>102</sup> I submit that legally it is inadmissible, and if admitted must tend to prejudice and endanger the prisoner on this trial.

Counsel reporting this case added a footnote in which he described the outcome as "exactly the opposite of that in *Geering*". There was clearly an urgent need for an authoritative ruling which would resolve the conflict between these two case authorities, and this was supplied, three years later, in *Regina v Garner and Wife*.<sup>103</sup>

G and W were accused of murdering G's mother in December 1861, by administering arsenic to her. It was beyond dispute that the deceased died from arsenic poisoning, and that G had legitimate access to arsenic. The essential issue at trial became one of whether the arsenic had been deliberately administered, or whether it had occurred as the result of an accident, and the Crown proposed to counter this latter suggestion by adducing evidence of the death of G's former wife in March 1861, at a time when G's current wife had lived with them as a servant. The former wife's death

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divert the attention of later lawyers away from an important issue. Three people had died after consuming G's cooking. She was either the victim of an inconceivably tragic series of accidents, or she had poisoned them. The third alternative – that she was simply a rotten cook – went more to her *mens rea* than to the causes of the deaths, which were arguably not accidental.

<sup>101</sup> *Reg v Thomas Winslow* (1860) 8 Cox C.C. 397.

<sup>102</sup> It is assumed that this is a reference to the "probity" of the evidence. Defence counsel seem by this point to have begun to protest against the inherently prejudicial nature of such evidence in the minds of the jury, in addition to the more traditional "ambush" argument.

<sup>103</sup> (1863) 3 F. & F. 681 and 4 F. & F. 346. N.B., however, that this was only at the level of the trial court (Lincoln Assizes). The reason why this case was reported twice, in successive volumes of the report series, is given by the reporter as being "on account of its very great importance". The second report is more detailed in dealing with the facts of the case.

had also been occasioned by arsenic, and the clear implication was that G and W had been conducting a clandestine relationship, and had disposed of the former wife in order that they might be married. From that, the jury might infer that they had been encouraged by their previous success to murder G's mother, which was the only charge for which they were on trial.

The two were convicted, and in a footnote to the Report the reporters cited *Geering*,<sup>104</sup> as being a case "of a similar nature". They added that:

. . . our law . . . unlike that of France, does not allow the whole history of the prisoner to be gone into, by way of showing the probability of his commission of the crime in question; on the contrary, seeks to shut out as much as possible evidence extraneous to the case, by way of avoiding prejudice . . . In the case cited,<sup>105</sup> the great argument against the admissibility of the evidence was, that its necessary tendency would be to create a prejudice against the prisoner; but then, of course, the evidence being legally admissible could not *per se* exclude it . . . The principle is always the same, is the evidence sufficiently connected with the matter in question?

The importance of *relevance* as the benchmark of admissibility was obviously generally recognised by this time, but there was also clearly a growing awareness of the need for that relevance to be so strong that it overrode any prejudice which its admission might generate.

*Geering* and *Garner* were cited by the Crown ten years later in *R v Cotton*,<sup>106</sup> in which C was convicted of the murder of her child by arsenic poisoning, in

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<sup>104</sup> Note 99.

<sup>105</sup> The subsequent reference to "the prisoner" suggests that they were referring to the *Geering* case.

<sup>106</sup> (1873) 12 Cox C.C. 400. *Cotton* was in turn cited, only a year later, in *Reg v Roden* (1874) 12 Cox C.C. 630, in what must be one of the few cases on record in which 'bad act' evidence was admitted in a case which ended in a directed acquittal.

circumstances in which the ingestion of the arsenic in question by the deceased could have been accidental. The Crown was granted leave to adduce evidence of the deaths by arsenic poisoning of two other children of the deceased, plus a lodger in the house to whom she had been engaged to be married. All three of these deaths appear to have occurred prior to the one on the indictment.

*Cotton, Roden, Garner*, and, most significantly, *Geering* were successfully cited by the Crown in *Reg v Heesom*,<sup>107</sup> in which H was charged with the murder of her infant child (S) by arsenic, a substance to which she had access through her employment. There was evidence of arsenic in the corpse of the child, and further evidence that H stood to benefit financially, by reason of an insurance policy taken out on the child's life by H. The Crown sought leave to adduce evidence of the death of another of H's children (this one, J, by her first marriage) in similar circumstances two years previously. H had also insured the life of that child. Neither the trial judge nor defence counsel seemed to have raised any objection until the Crown also sought leave to adduce evidence of the similar death, exactly a month after the death of S, of H's mother (L) during a visit to H's home.<sup>108</sup>

In admitting the evidence, the trial judge observed:<sup>109</sup>

I cannot help thinking it is within the principle of *Reg v Gearing* (sic), namely, that evidence of the domestic history of the family during a period of four deaths in that family by poison can be received to enable the jury to decide under what circumstances the poison had been taken. If there had been no case on the point I would have paused to consider whether the evidence could be received, but after the decision quoted, and with which I am quite satisfied, I have no doubt that it is competent to show that the

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<sup>107</sup> (1878) 14 Cox C.C. 40.

<sup>108</sup> It appears from the case report that H had also insured L's life.

<sup>109</sup> Lush J, at 44.

death of the child . . . . was not due to the accidental taking of arsenic. To prove the intention, you may show the motive, and this is the link in the chain of evidence.<sup>110</sup>

By this point in the developing case-law, it had clearly become established that guilt of a murder which was simply one in a series of suspicious deaths could be proved by reference to the remaining deaths in the series in order to prove “system”, “motive” and/or “criminal intent”. Although the term “coincidence reasoning” had not yet been employed, it clearly underlay the logic of the emerging principle.

The application of this logic to a number of deaths in a series in order to demonstrate a “system” employed by the alleged perpetrator of those deaths, and at the same time eliminate any credible hypothesis of coincidence or lack of intent, was exemplified by *Reg v Flannagan and Higgins*,<sup>111</sup> the closest in time of this group of cases to the watershed judgment in *Makin*.

In this case, the scenario was once again an allegation of serial poisoning by arsenic, by two sisters, F and H. The indictment charged them jointly with the murder of T, who had been H’s husband and F’s brother in law, and who had demonstrably died from arsenic poisoning whilst in their joint care. The issue at trial was the usual one of whether this had occurred accidentally, or as the result of the deliberate actions of F and H, and in support of the latter theory, the Crown sought leave to adduce evidence of the deaths of three other persons within the previous three years, all of whom had died from the same cause whilst the accused had access to them.

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<sup>110</sup> Again, with respect, an important issue of logical relevance is being overlooked in the enthusiasm to ‘pin the tail on the donkey’ by finding a *purpose* for which the evidence is being admitted. The number of deaths, and the factual context in which they all occurred, simply defied coincidence.

<sup>111</sup> (1884) 15 Cox C.C. 403.

The trial judge admitted this evidence over the strong protests of defence counsel, because:<sup>112</sup>

. . . . I cannot conceive that on a charge of this nature it is consistent with common sense to exclude such evidence. It has been decided in some cases – in one case at least, on very high authority -<sup>113</sup> in the case of poisoning by arsenic, that evidence of the deaths of people other than the deceased, whose death was the subject matter of the particular inquiry, might be given, with a view to showing, not that the prisoner had feloniously poisoned the deceased, but that the deceased had, in fact, died by poison administered by someone. That is the extent to which that authority went, and that is the extent to which I have no hesitation in saying I shall admit evidence as to the other deaths in this case. There is one matter against which I wish to guard myself. I don't think there is any authority, neither do I think it clear that it would be altogether consistent with reason and good sense, to admit such evidence as evidence of motives: . . . .

In dismissing a submission that the evidence in question was unduly prejudicial to the accused, his Lordship used terms very similar to those later adopted by Lord Herschell in *Makin*, when he said that:<sup>114</sup>

. . . he was of opinion that the evidence was admissible. The question of its prejudicing the prisoners was not what he had to consider. The question was, Was it material to the issue they were there to try? And if it was, sorry as he might be if any prejudice should thereby accrue to the prisoners, it was, nevertheless, his duty to admit it. And he held it to be material for the reasons given by the judges in *Reg v Geering* , with which he most entirely agreed, and apart from that case, he should have had no doubt whatever in admitting the evidence.

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<sup>112</sup> Butt, J, at 408.

<sup>113</sup> Citing *Geering* (note 99).

<sup>114</sup> At 410. N.B. that the Report reproduces the judge's words in the third person.

*Miscellaneous cases*

The same gradual appreciation of the ‘lack of coincidence’ value of several factually similar events in an accused’s life is also to be found in isolated pre-*Makin* cases involving other crimes. In *Regina v Rowland Dossett*,<sup>115</sup> for example, D was charged with the arson of a hayrick by means of firing a gun close to it, and in order to rebut the suggestion that the fire was caused accidentally, evidence was admitted that on the previous day, the same hayrick was also found on fire, with D standing close to it with a gun in his hand.

This was for the purpose of disproving the defence of “accident”, and proving wilful behaviour on the part of the accused, in terms which foreshadowed those to be employed six decades later by Lord Herschell in *Makin*, namely that:<sup>116</sup>

Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable.

The experienced and learned reporters of this case added, as a footnote,<sup>117</sup> that it was “the constant practice”, in cases of uttering forged bank notes knowing them to be forged, and cases of receiving stolen property knowing it to be stolen, to admit “evidence of other utterings and of other receivings by the prisoner, with a view of shewing a guilty knowledge”.

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<sup>115</sup> (1846) 2 Car. & K. 306. See also *Rex v Charlotte Long* (1833) 6 Car. & P. 179.

<sup>116</sup> At 307. Despite the admission of this evidence, D maintained his accident defence, and was ultimately acquitted by the jury. See also *Regina v David Gray* (1866) 4 F. & F. 1102, in which both *Geering* (note 99) and *Garner* (note 103) were cited as a justification for further extending the principle relied on in those cases to a case of arson.

<sup>117</sup> *Ibid.* However, the only cases cited in the footnote were *Voke R & R.*, C.C. 531, a charge of “malicious shooting”, and *Clewes* (note 96), and the unreported case of *Donnall* (1817), both murder cases.

A further extension to the slowly-widening principle which had apparently emerged in *Geering* was also evident in a series of cases involving sexual offences, in which previously the Crown had not been allowed any latitude.<sup>118</sup> The break-through case was *Regina v Reardon*,<sup>119</sup> in which R was charged with the rape of the nine year old child of the woman in whose house he was lodging at the time. The Crown proposed to lead evidence that R had committed the offence alleged on the indictment on a Thursday, had threatened the girl with violence if she complained to anyone, and by means of the same continuing threat had committed two more rapes against her, on the following Saturday and Monday, following which the child had complained to her mother, and R had been arrested.<sup>120</sup>

Willes J,<sup>121</sup> ruled that:

The evidence is admissible. Virtually it is all part of one and the same transaction. In a case before me on the Western Circuit,<sup>122</sup> a case of larceny of grain from a barn, in which the owner had watched and detected several stealings by the same person, I admitted evidence of all of them.

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<sup>118</sup> A very early case in this area had been *The King v John Carey Cole* (1810, Judge's Note Books on Crown Cases, volume 3), which remained officially unreported for over a century until it was reproduced as a footnote to the judgment in *Sims* (note 203). In that case, Cole had been charged on three separate indictments with three acts of sodomy, involving three separate "victims", and had been convicted of two of them after the Crown had been allowed to adduce the evidence of the father of the third victim, who had confronted Cole with what he had been accused of doing with his son, and testified that Cole had replied to the effect that sodomy "was his natural inclination". The convictions had been overturned on appeal as the result of the admission of this evidence, because (*ibid*) ". . . it would not be allowable to shew . . . that the prisoner has a general disposition to commit the same kind of offense as that charged against him". In the cases which followed, there were *other* justifications for the admission of bad act evidence, based on their factual relevance to the instant case.

<sup>119</sup> (1864) 4 F. & F. 76.

<sup>120</sup> Undoubtedly, in a modern context, this evidence would also be admissible as "uncharged act" evidence of "relationship", in addition to arguably being admissible under the heading of "*res gestae*".

<sup>121</sup> At 77

<sup>122</sup> This case was not identified.

Defence counsel submitted, in argument,<sup>123</sup> that such a rule could not apply “where, as in this instance, there are separate felonies on different days”, but the fallacy in that argument was immediately exposed by his Lordship, who countered that:<sup>124</sup>

It is quite a mistake to suppose that you cannot prove a matter because it would be the subject of a different count or indictment. There is a decision to that effect,<sup>125</sup> which lays that down, and illustrates it by reference to the case of larceny . . . to show that it was not a mistake, and so in the case of embezzlement, and I have acted on that repeatedly, even in the case of murder.<sup>126</sup>

In applying the rule he had just expounded to the facts of the instant case, his Lordship added:<sup>127</sup>

. . . the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions . . . this seems to me to give a continuity to the transaction, which makes such evidence properly admissible.

The full evidence of the victim was admitted, and R was convicted.

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<sup>123</sup> *Ibid.*

<sup>124</sup> At 77-80.

<sup>125</sup> This was believed by the Reporter to have been *R v Bleasdale*; see note 78.

<sup>126</sup> Citing his own previous ruling in *Garner*; see note 103. His Lordship had, of course, admitted similar fact evidence in that murder trial the previous year, and in so doing appears to have relied upon the authority of *Geering*, at least according to the reporters in that case. The same reporters also cite *Geering* in support of the ruling in the instant case; see note (c) at p.79 of the Report.

<sup>127</sup> At 80.



## Summary

Prior to *Makin*, judicial decisions on the admissibility of bad act evidence against a criminal accused were initially made on an *ad hoc* basis, and only when a decision to admit the evidence could be justified on the basis of factually parallel previous case authority. The case law thereby developed in a series of ‘cluster groups’ with specific offences at their nucleus.

Over time, and with increasing confidence, the trial judges began to apply analogy reasoning from one cluster to another. In ground-breaking cases such as *Geering* and *Francis*, the rationale for admission became, not the *type of offence* of which the accused stood charged, but *the issue in the case* to which it was seen to be relevant.

This then set the scene for *Makin*, in which the Judicial Committee of the Privy Council contributed to the jurisprudence of the subject by crafting an over-arching principle to cover *all* future cases. However, because of the continual failure of the earlier courts to acknowledge the factual similarity of one incident to another as one of several logical routes to relevance, and therefore admissibility, a new era of ‘case categories’ was destined to succeed the old.

## Chapter 3:

### English law from *Makin* to *Boardman* – the era of categorisation

#### Chapter synopsis

The judgment of the Judicial Committee of the Privy Council in *Makin v Attorney-General for New South Wales* was to dominate the common law world for some eighty years, before it was overtaken by the new admissibility formula handed down by the House of Lords in *Boardman v DPP*. In an attempt to fuse previous isolated decisions into a workable formula for the future, the Committee, whose joint judgments were delivered by Lord Chancellor Herschell, handed down two related statements of law. The first was that the mere fact that an accused had been guilty of bad behaviour in the past, or possessed a bad character, was not to be admissible in evidence in any subsequent trial involving that accused *if this was all that the evidence disclosed*. The second was that if the discreditable antecedents of an accused went beyond that, and were relevant to an issue before the jury in any subsequent trial, the trial judge should not shrink from admitting them in evidence merely because they cast that accused in a bad light.

The next eighty years witnessed a confusion of case precedents regarding the practical application of the second of these two statements. Put simply, *when precisely* could evidence of an accused's additional bad behaviour be said to be admissible because it revealed more than the *mere existence* of a history of poor past behaviour?

There emerged from this process a regime of 'categorisation' of circumstances in which similar fact evidence might be admitted, which did nothing to clarify the law, but instead obscured the true reason for the admission of such evidence. Principled and rational analysis was replaced by rote categorisation. This was brought to an end by the

decision in *Boardman*, which in terms of clarifying the law had all the qualities of a Trojan Horse. By this stage, however, those who had fought to rationalise what had been handed down in *Makin* were grateful for *any* change.

During that perplexing period, the law, and those who sought to implement it, drifted further away from an appreciation of the true justification for the admission of similar fact evidence properly so called, namely *its factual relevance to a live issue in the case*. This is far more compelling than whether or not the evidence ‘ticks the box’ in respect of a predetermined ‘category’ of issue.

### **The question raised in *Makin***

John and Sarah Makin were convicted of the murder of an infant (Horace Murray), who had been handed to them by his mother for adoption, as part of what appears to have been a regular practice by the Makins. They fell under suspicion of having done away with him, and police began to make enquiries in and around various Sydney properties which the Makins had occupied at various times during the material period. They eventually located a total of twelve infant corpses associated with these properties. The evidence of these discoveries was admitted during their trial, the Makins were convicted, and they appealed against the admission of this evidence.

The only direct evidence was the finding of the bodies *other* than that of Horace Murray; the significance of the precedent which was set in this case was the use which was made of this evidence, which contributed overwhelmingly towards the resulting convictions when it was properly analysed for what it signified, in light of how the Makins came to be in charge of the deceased.

The first appeal against conviction was to the New South Wales Supreme Court<sup>128</sup>, where it was argued, on the Makins' behalf, that the finding of the other infant bodies could not be admitted in the absence of some direct evidence linking the accused to the death of Horace Murray. Windeyer J rejected that argument, ruling,<sup>129</sup> that the involvement of the Makins in the death of the child could be inferred beyond reasonable doubt by a combination of facts,<sup>130</sup> which led to only one overpowering conclusion. Not only had the Makins been in the business of baby farming, but that business was of such a nature that it could not be continued profitably unless the infants were killed almost immediately after their handing over. Accordingly, it was highly probable that the death of the particular infant was a death in the ordinary and inevitable course of such a business.

As his Honour put it:<sup>131</sup>

A family might be unfortunate enough to take a house in the back yard of which babies had been buried by a former tenant; but no one could believe that it was by mere coincidence that a person took three houses in the back yards of which former tenants had secretly buried babies.

This line of reasoning employed what Wigmore was,<sup>132</sup> only a few years later, to identify as:

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<sup>128</sup> (1883) 14 L.R. (N.S.W.) 1, in which the case is cited as *R v Makin and Wife*.

<sup>129</sup> At 13.

<sup>130</sup> He identified these facts as (1) the discovery of the other infant corpses in several properties occupied at one time by M, (2) the number of other infants "adopted" by M, (3) the inadequacy of the money received by M to keep those infants for more than a short time, (4) the good health of the infants when handed over, and (5) the fact that none of the infants had been heard of since.

<sup>131</sup> At 22.

<sup>132</sup> *Wigmore on Evidence* (Chadbourn Rev. 1979), Vol. II, at §302. Wigmore's first edition in his own right was published in 1904, and contained this same passage.

. . . . the doctrine of chances – that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.

Put another way, the possibility of coincidence has been reduced to the point at which it is no longer a rational option.<sup>133</sup> By eliminating coincidence, one is obliged to accept the only rational alternative.

Windeyer J. also rejected, without difficulty,<sup>134</sup> the submission that similar fact evidence could only be adduced in rebuttal of a specific defence (in this case, presumably one of “accident”, although this was never formally pleaded on the Makins’ behalf). His Honour clearly preferred a broad approach which appealed to the logic of everyday human experience, without reference to specific defences which might conceivably be raised by an accused. As he put it:<sup>135</sup>

. . . . if the nexus between . . . two events is such as to irresistibly lead the mind to the conclusion that the guilty agent in one case must be the guilty agent in the other, the admission of such evidence as leads to this conclusion must be right, *irrespective of the existence of any abstract question of accident or design* (emphasis added).

*It is the fundamental tenet of this thesis that had this remained the final judgment in the Makin case, a century or more of confusion, uncertainty and contradiction regarding the admission of similar fact evidence might have been avoided.*

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<sup>133</sup> See also Julius Stone (note 59), who refers to “a point in the ascending scale of probability when it is . . . near to certainty . . . .” Wigmore himself added, *ibid*, that “. . . it is the improbability of a like result being repeated by mere chance that carries probative weight. . . .”

<sup>134</sup> At 24.

<sup>135</sup> *Ibid*.

However, and, with hindsight, regrettably, the Makins were entitled to one more appeal. By virtue of the jurisdictional arrangements then in place between New South Wales and its colonial masters in England, the matter ultimately came before the Judicial Committee of the Privy Council (“JCPC”) in London.<sup>136</sup>

Before the JCPC, it was argued, on the Makins’ behalf,<sup>137</sup> that the common law restricted the evidence led by the Crown “strictly to direct evidence of the commission of the particular act charged”, and excluded evidence of “similar acts committed, or supposed to have been committed, by the same prisoner on other occasions”. It did so, it was submitted, because such evidence was “wholly irrelevant” and “inconvenient and dangerous”, and “tended both to confuse and unduly to prejudice the jury”.<sup>138</sup> It was also argued that there had been no direct evidence led relating to the killing of Horace Murray. In support of their submissions, defence counsel cited *Reg v Oddy*.<sup>139</sup>

The Crown, for its part, sought to justify the admission of *all* the evidence on the ground that it was, for various reasons given during legal argument, relevant to the issue which the jury had to determine, which was whether or not the Makins had killed Horace Murray. Crown counsel cited, *inter alia*, *R v Geering*,<sup>140</sup> for the proposition that “It was the general and not the exceptional rule of law to admit such evidence to rebut defence of accident, and to shew existence of motive and a systematic course of conduct”.

It will be noted that the legal arguments on both sides were based upon established precedent, without reference to any general principle such as had been

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<sup>136</sup> *Makin v Attorney-General for New South Wales* [1894] AC 57.

<sup>137</sup> At 60 -61.

<sup>138</sup> This appears to have been the first suggestion before a court at appeal level that the rationale behind the exclusion of similar fact evidence might be the potential prejudice to the accused posed by the admission of evidence which was of insufficient direct relevance to the facts of the case.

<sup>139</sup> Note 83.

<sup>140</sup> Note 99.

identified in the earlier appeal. This was to prove decisive of the judgment which followed.

### **The emergence of the Rule**

In dismissing the appeal, Lord Chancellor Herschell, in delivering the unanimous opinion of the JCPC,<sup>141</sup> began by ruling that there was “ample” direct evidence of the murder, before going on to observe that the real question which their Lordships had to determine was the admissibility of the evidence relating to the finding of *other* bodies of children who might have been entrusted to the appellants.

In dealing with the two leading cases cited in submissions by counsel, their Lordships experienced little difficulty in following *Geering* rather than *Oddy*.<sup>142</sup> The different *rationes* of these two authorities were neatly combined into two contrasting statements of law,<sup>143</sup> which were intended by their Lordships to indicate the appropriate principles to apply when considering questions of this nature. They were as follows:<sup>144</sup>

[1] It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. [2] On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

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<sup>141</sup> At 64.

<sup>142</sup> See notes 99 and 83 respectively.

<sup>143</sup> At 65. These two statements subsequently became known collectively as “The Rule in *Makin*”.

<sup>144</sup> Italicised numbers added.

The *first* of these statements firmly outlawed what would later be referred to as “forbidden reasoning”,<sup>145</sup> along the lines of “Once a thief, always a thief”, which would, to adopt the argument of defence counsel in *Makin*, place prejudice above strict relevance. It also asserted that *general* character is irrelevant, and that something more factually specific will be required before an accused person’s previous behaviour will have sufficient relevance to justify its admission. In light of this, the second statement of law describes the exception rather than the rule.

The uncertainties, contradictions and confusion which crept into this area of law in the years following *Makin* arose out of Lord Herschell’s *second* statement of law, and the question it left open regarding what factor(s) may make similar fact evidence so “relevant to an issue before the jury” as to override any objection to its admission. As Lord Herschell himself conceded:<sup>146</sup>

The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

Their Lordships clearly had in mind that when such evidence *is* “relevant to an issue before the jury”, then it should not be excluded simply because it reveals past misdeeds by an accused. This much had been foreshadowed in landmark judgments in certain key cases prior to *Makin* such as *Richardson*<sup>147</sup>, *Flannagan and Higgins*<sup>148</sup>, and *Dossett*.<sup>149</sup> But these had all been specific decisions based on the unique facts of each case. What was now being attempted was the construction of a general principle which

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<sup>145</sup> Per Lord Hailsham in *DPP v Boardman*; see note 252.

<sup>146</sup> *Ibid.*

<sup>147</sup> Note 87.

<sup>148</sup> Note 111.

<sup>149</sup> Note 115.



would cover *all* circumstances in which such evidence *might be* relevant. Certainly, even at this early stage, relevance was seen as the key to admissibility, but not on so broad a base as that proposed by Wigmore and Windeyer J. The JCPC clearly did not feel any need to comment on Windeyer J's rejection of the 'categories of admissibility' approach in favour of the broader test based on "doctrine of chances" reasoning.

Even then, had subsequent courts focused more on the fact that similar fact evidence should be excluded when it reveals nothing of relevance to the facts of the instant case,<sup>150</sup> all might have been well. However, what followed was an eighty-year period during which the English courts allowed themselves to misinterpret what Lord Herschell had handed down. In the process, they focused too intently on Lord Herschell's *second* statement. Instead of regarding the admission of similar fact evidence as an exception to a broad general rule banning its use unless justified by *factual relevance*, they began to amass a collection of 'categories' of situations in which it might be admissible, following the old 'case' methodology.

His Lordship's reference to rebutting the "accident" defence was clearly intended to apply the broad principle he was expounding to the specific facts of the case before him.<sup>151</sup> But legal posterity was not well served by whoever drafted the Headnote to the Appeal Cases report of *Makin*, which states that the ratio emerging from the case was that:<sup>152</sup>

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<sup>150</sup> This was the essence of Lord Herschell's first statement of law. Specifically, he had ruled that the mere fact that an accused has transgressed on a prior occasion is inadmissible; it was to be many years before the reason for this was fully appreciated, it being that *the mere fact of previous offending is insufficiently relevant*.

<sup>151</sup> The brevity of both case reports when dealing with the actual facts of the case is such that one cannot be certain that the "accident" defence was even raised by the Makins, which would make this case arguably the first in which similar fact evidence was used to prove the commission of the *actus reus* by the accused. At the very least, it would serve as the authority for the admission of similar fact evidence to rebut "a defence open to the accused", whether formally raised by the defence or not. This point is taken up again below.

<sup>152</sup> At 57.

Evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.

This is a gross under-valuation of the breadth of the second of his Lordship's governing principles, and effectively shrinks the potential "issues before the jury" in respect of which similar fact evidence is admissible to those which may be said to involve some defence which the accused has either already claimed, or has available to them on the facts.<sup>153</sup> It was also symptomatic of the tendency (identified in Chapter 2) to develop the law according to narrow precedent, rather than by reference to a broadly-stated principle.

It was also possible to take a much broader view of what had actually been stated by Lord Herschell, by interpreting "relevant to an issue before the jury" as including "anything which might be relevant to those matters which a jury has to decide". This could have been justified by reference to case authorities other than *Geering*; for example, in *Francis*,<sup>154</sup> a former Lord Chief Justice had obliquely identified, as a relevant issue, the elimination of coincidence as the logical basis for concluding that while ". . . a man may be many times under a similar mistake . . . it is less likely he should be so oftener than once . . .".

A decade or so after *Makin*, the approach taken by Windeyer J. in the New South Wales court was still being suggested as an alternative, only to be dismissed out of hand by a higher English court. Thus, in *Ball and Ball*,<sup>155</sup> the trial judge, when considering whether or not *Makin* might be authority for admitting evidence of the prior

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<sup>153</sup> In such cases, the trial judge is therefore obliged to leave the defence to the jury, after directing them on it; see, for example, *R v Payne* [1970] Qd R 260.

<sup>154</sup> Note 92, at 615-6.

<sup>155</sup> Note 6, at 52, per Scrutton J. See also *Smith* (note 26).

incestuous behaviour of the accused brother and sister, opined that the similar fact evidence against the Makins:

. . . must have been given to enable the jury to draw the proper inference as to the sort of business or transaction that the prisoners were carrying on, of which the disappearance of this particular child was an incident. From proving the sort of business carried on to proving the relation of the parties seems to me a very small step.

However, on appeal, the House of Lords employed the authority of *Makin* for the narrow ruling that the evidence of the prior behaviour of the Balls was “clearly admissible” to prove the *actus reus*, thereby confirming the creation of yet another ‘category’ of admissibility to add to the growing collection.

One of those still campaigning for a much broader rule of admissibility, three decades after *Makin*, was the revered academic Julius Stone. In one of the most frequently quoted journal articles in this area of the law,<sup>156</sup> Stone sought in vain to restore the pre-eminence of the ‘admissibility via factual relevance’ approach advocated by Wigmore, by observing of what had been laid down in *Makin*, that:

Here is no broad rule of exclusion with exceptions, but a broad rule of admissibility where there is relevance, except where the only relevance is *via* disposition.

The examples of relevance given . . . are clearly no more than examples.<sup>157</sup> Yet in the next three decades they were to become the starting point for further attempts to enumerate all the possible exceptions to the rule of exclusion, and judges frequently overlooked the question of relevance and merely asked, “Does this case fall within either of the two classes mentioned in *Makin*’s case? (original emphasis).

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<sup>156</sup> Note 59, at 975.

<sup>157</sup> He was referring to those handed down by Lord Herschell in his second statement of law in *Makin*.

What Stone had observed was a continuation of the ‘case’ methodology which had existed prior to *Makin*, which soon metamorphasised into a ‘categorisation’ approach, by means of which:<sup>158</sup>

. . . . the courts have no hesitation, if there is no ready-made exception, in creating a new one into which the fact may then be fitted<sup>159</sup>. . . . Their more recent difficulties have arisen because judges and writers have attempted to make categories of admissible relevance, and have tested evidence of similar facts by seeking to determine whether they fitted into some one of the categories.

### **The legacy of *Makin***

The post-*Makin* cases may be seen to have fallen into three broad chronological groups. The earliest group ignored *Makin* altogether, and drew precedents from the cases which had preceded it. The second group involved a widening search for defences “otherwise open to the accused”. But the most radical departures from what had gone before arose a few years later, when courts began to take the broader “relevance” principle where it had never been applied before, in the process of recognising new ‘categories’ of admissibility.

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<sup>158</sup> Note 59, at 975-6.

<sup>159</sup> These combined processes of analogy reasoning and ‘action on the criminal case’ received the ultimate accolade in *Harris v DPP* [1952] A.C. 694 at 715, when it was declared that the categories of admissibility were not closed.

a) *Pretend it never happened*

Some of those courts which could, in its immediate aftermath, have utilised the newly-stated “Rule in *Makin*”, seem not to have even been aware of its existence. In these courts at least, it seems to have been ‘business as usual’, as if *Makin* had never happened.<sup>160</sup> As late as twenty years after *Makin*, even the intermediate appeal courts in England were still making decisions on the extent to which similar fact evidence could be employed by the Crown in a criminal case without reference to *Makin*. For example, in *Reginald Mason*,<sup>161</sup> the Court of Criminal Appeal reverted yet again to the old “action on the case” process as if neither the JCPC, nor the House of Lords,<sup>162</sup> had ever considered the broader application of the recently emerged principle.

b) *Treat it as another narrow precedent based on its own facts*

Those who actually read, and sought to apply, *Makin*, had a choice between two *rationes* which they might take from it. The first was the broader of the two, explained in the actual words of Lord Herschell, to the effect that similar fact evidence was admissible whenever it was “relevant to an issue before the jury”. The second was the narrower ratio to be found in the Headnote to the case report, which appeared to limit the admissibility of similar fact evidence to the rebuttal of “a defence otherwise open” to the accused.

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<sup>160</sup> In what appears to have been the first post-*Makin* case to come before the Court for Crown Cases Reserved, *The Queen v Rhodes* [1899] 1 QB 77; 12 Cox C.C. 612, *Makin* was not even cited. *Makin* was similarly snubbed in *The King v Fisher* [1910] 1 KB 149.

<sup>161</sup> (1914) 10 Cr. App. R. 169. See also *Ellis* [1910] 2 KB 746, in which the Court of Criminal Appeal unanimously applied the spirit of *Makin* without once referring to it. Instead, it preferred to rely directly on the factual analogy with *Fisher*. See also *Baird* [1915] AC 186, in which the *rationes* of both *Fisher* and *Ellis* were followed without reference to *Makin*.

<sup>162</sup> The House had handed down its ground-breaking decision in *Ball and Ball* three years previously. However, because of other implications arising from this judgment, it is best considered below, at note 173.

The second group of post – *Makin* cases followed the *narrower* of these two routes. The need to find an arguable “defence otherwise open to” an accused, in order to justify the admission of evidence of previous similar misdeeds by them, seems in fact to have dominated the minds of Crown counsel in many of the leading English cases between *Makin* and *Boardman*.<sup>163</sup> This sustained, but narrow, approach obscured the potential breadth of the second rule which Lord Herschell had propounded, and further obscured the central significance of the *first* rule.

Typical of what was going on during this period was the decision reached by the majority Court for Crown Cases Reserved in *The King v John Bond*,<sup>164</sup> which, in dismissing B’s appeal, employed analogy reasoning firmly rooted in the narrower ratio of *Makin*, in concluding that:<sup>165</sup>

This surely was “a defence open to the accused” which the prosecution might rebut – a defence, at all events, clearly ejusdem generis with the particular defences mentioned by Lord Herschell.<sup>166</sup> (footnote omitted).

A.T.Lawrence J at least, in this case, was prepared to concede that:<sup>167</sup>

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<sup>163</sup> Examples of this process were *Thompson v The King* [1918] AC 221 (alibi), *Smith v The King* (1915) 11 Cr. App. R. 229 (accident) and *Noor Mohamed v The King* [1949] AC 182 (lack of guilty intent).

<sup>164</sup> [1906] 2 KB 389, an abortion trial in which the defence was “accident”. See also *R v Starkie* [1922] 2 KB 275, in which a similar judgment was handed down on the narrow authority of *Bond*.

<sup>165</sup> Per Jelf J, at 413.

<sup>166</sup> This still, however, appears to be a process of “analogy”, rather than “deductive”, reasoning. Again it also illustrates the ongoing concentration on the “narrow” ratio of *Makin*, rather than its broader principle.

<sup>167</sup> At 421. His Lordship appears to have been one of the first judges, post-*Makin*, to appreciate that the second statement of law in Lord Herschell’s judgment was merely citing examples of what was intended to be a general principle, of broader application, based on *relevance*. He also referred, at 424, to the need for “ . . . a nexus between the two sets of facts. . . . ”.

There is no special rule of the law of evidence applicable to accident or to system. These are merely convenient phrases indicative of cases in which evidence of this character is admissible.

The outer limits of this early ‘narrow’ application of *Makin* were reached in *The King v Boyle and Merchant*,<sup>168</sup> in which the unanimous Court of Criminal Appeal confirmed that the Crown might adduce similar fact evidence, not only in respect of defences *actually* raised by the accused, but defences which *might be open to them* on the facts of the case. This simply invited Crown Counsel to be more inventive in seeking to justify the admission of similar fact evidence.<sup>169</sup>

c) *Broadening the “issues” covered by Makin*

All these early post-*Makin* decisions had dealt with what were essentially defences which denied *mens rea*, once the Crown had proved the *actus reus* by direct evidence. The next extension to the “issues” which might be proved under the *Makin* Rule involved proof of the *actus reus* itself.<sup>170</sup>

The first of these decisions was *The King v Chitson*,<sup>171</sup> in which C had been convicted of carnal knowledge of B, a girl under 16. Part of B’s evidence in chief at the trial was that the day after the offence, C had told her that he had done the same thing to

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<sup>168</sup> [1914] 3 KB 339. The facts of this case were complex, and are not germane to the author’s reason for citing it.

<sup>169</sup> As one commentator (Williams, “Evidence of Other Offences”, (1923) Law Quarterly Rev. 212, at 220) observed when reviewing this case, “. . . what check is to be put upon the ingenuity of the prosecution in tabulating possible defences which would open up the evidence of other offences?”

<sup>170</sup> Arguably, there was already some case precedent for such an apparently bold step forward. As already indicated, it is not clear from the JPCPC report of *Makin* whether or not the accused in that case had claimed that the death for which they were on trial was accidental. If not, then the finding of the other infant bodies had been admitted in direct proof of the Makins’ involvement in the death cited in the indictment. Similar reasoning seems to have underpinned the decision in *Geering* (See note 99).

<sup>171</sup> [1909] 2 KB 945

another under-age girl, H. The unanimous decision of the Court of Criminal Appeal,<sup>172</sup> dismissing C's appeal, was delivered by A.T. Lawrence J, and it contained the following:

We are . . . of opinion that the learned judge rightly admitted the [evidence], not in order to prove a habit or system, as was the case in [*Makin*] and [*Bond*], but because the evidence was . . . *material to the issue as to whether the prisoner did commit the offence for which he was then being tried.* (author's emphasis, footnotes omitted).

Three years later, the House of Lords handed down the first decision which it was called upon to make regarding the true extent of the general principle which had been laid down in *Makin*. The same ruling also laid the foundations for the creation of yet another subset of similar fact evidence, this time dealing with "relationship". The case in question was *The King v Ball and Ball*.<sup>173</sup>

In that case, a brother and sister were charged with incest. The circumstantial fact that they occupied a house together in which there was only one bedroom, furnished with only a double bed which both of them appeared to have been occupying, was supplemented by evidence that they had lived together as man and wife on a previous occasion *before* incest became a statutory crime, during which time the female accused had given birth to a child which had been registered with the male accused as its father. The admission of this prior relationship evidence was justified by the House of Lords on the ground that it shed light on the true nature of their relationship at the time covered by the charge,<sup>174</sup> even though the previous behaviour was precisely the

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<sup>172</sup> Lord Alverstone C.J., Darling and A.T. Lawrence JJ, at 947-8.

<sup>173</sup> [1911] A.C. 47. Any lingering doubt there may have been regarding the authority of *Makin* was also dispelled in this case, when the principle it had established was endorsed by the House of Lords.

<sup>174</sup> Presumably it employed the circumstantial common law "presumption of continuance"; see, e.g. *Mason v Tritton* (1994) 34 NSWLR 572.



same as that alleged in the instant case,<sup>175</sup> and even though, on that prior occasion, the couple had been committing no crime.

It was also said to justify the admission of this evidence of “prior relationship” that the entire nature of the relationship between the two accused at the material time specified in the indictment assumed a different significance when the “propensity” evidence was added to the new circumstantial evidence, and *the facts as a whole* were then considered.

As indicated above,<sup>176</sup> the trial judge, Scrutton J, had given,<sup>177</sup> as his reason for admitting the evidence, that it was admissible under the broader rationale of ‘eliminating coincidence’ by means of ‘the doctrine of chances’, although he did not employ either term. This appears to have been damned by silence during the ultimate appeal to the House of Lords, in which it was held that the evidence was plainly admissible to prove “the nature of the relationship between the parties”, or, as it was characterised in *Ball and Ball*, the nature of the “system” of criminal behaviour engaged in by the accused.

However, since the relationship alleged on the indictment was being proved by means of evidence of the *same* relationship in the past, it follows that the very *actus reus* with which the accused were charged was being proved by means of propensity evidence. Significantly, this was justified by the creation of the notional defence of “innocent association” implicit in any denial of a sexual offence. Yet another ‘category’

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<sup>175</sup> It is therefore difficult to escape the conclusion that the jury were thereby being encouraged to draw a “conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried” (Lord Herschell in *Makin*, note 144). The primary rationale of Lord Herschell’s first statement of law appeared to have been overridden by the compelling *relevance* of the similar fact evidence. Thereafter, it was impossible to argue against the proposition that even pure ‘propensity’ can be sufficiently relevant to justify its admission in proof of guilt.

<sup>176</sup> See note 155.

<sup>177</sup> His words were cited at pp. 50-53 of the House of Lords report.

had been created, which was to cause endless problems in future sexual offence cases in which the prior behaviour of the accused towards the victim was narrated by the victim in their testimony.<sup>178</sup>

Following this endorsement, at the highest judicial level, of the use of similar fact evidence to prove even the *commission* of an offence, the floodgates opened for a whole new range of applications of propensity evidence to prove the *guilt* of the accused directly, rather than the absence of any defence once their apparent guilt has been established by direct evidence.<sup>179</sup>

### **Another missed opportunity**

It was ironic that during the very period in which English law was heading down the blind alley of ‘categories’ methodology, there arose a paradigm case for the application of the ‘doctrine of chances’ approach advocated by Wigmore and others. The seemingly inevitable outcome was the addition of yet one more category of admissibility, unwittingly labelled “coincidence reasoning”. This overlooked the key to the much broader logic underlying the admission of much similar fact evidence properly so called, namely *admissibility through absence of coincidence*.

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<sup>178</sup> The so-called ‘uncharged acts’ cases. The same process was successfully employed by the Crown in *The King v Shellaker* [1914] 1 KB 414, in which S was charged with the carnal knowledge of a girl under 16, and the Crown was granted leave to adduce evidence of the girl’s previous pregnancy, and certain conduct by S which tended to show that he had been the father of her child. This use of the fictional defence of “innocent association” would subsequently be described in the House of Lords as “. . . a specious manner of outflanking the exclusionary rule”; see Lord Wilberforce in *R v Boardman*, note 253, at 443.

<sup>179</sup> In *Perkins v Jeffrey* [1912] 2 KB 702, for example, it was employed in order to prove “identity”, in an indecent exposure case in which the High Court condoned the admission of evidence tending to show, not only that J had committed the act alleged against one victim, but had committed several more, on the ground (at 707) that it tended to prove that the victim “was not mistaken in her identification” of the accused. There could be no fictional use of a defence notionally claimed by the accused in this case, given that he was flatly denying guilt by way of an open “Not Guilty” plea.

In *George Joseph Smith*,<sup>180</sup> S was charged with the murder of M, whom he had “married” bigamously some time previously. He had then taken her to a solicitor, who had advised him that he could only gain access to M’s property upon her death. S then took M to a doctor with a suggestion (denied by the doctor) that M had recently suffered an epileptic fit. S had also previously purchased a new bath in which, a few days after the visit to the doctor, M was found drowned after allegedly suffering an epileptic fit.

The Crown was allowed to lead evidence of the deaths of two other “wives” of S (B and L) in almost identical circumstances *after* the death of M. In each case, the lady in question had recently taken out a life insurance policy of which S was the beneficiary. S was convicted of the murder of M, and this conviction appears to have proceeded from a realisation that the coincidence of three wives dying in this fashion without some criminal behaviour by S was too remote to contemplate.<sup>181</sup>

One of the grounds of complaint raised on appeal was that:

The judge admitted [the evidence of the deaths of B and L] as evidence of a system of murdering women, with whom the appellant had gone through a form of marriage, for the sake of their money.<sup>182</sup> . . . . It should not be assumed that there was any *prima facie* case here; there was strong evidence of motive, and some of opportunity, but none of any physical fact.

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<sup>180</sup> (1915) 11 Crim App R. 229

<sup>181</sup> To adapt the famous epigram of Oscar Wilde (per Lady Bracknell in *The Importance of Being Ernest*), “To lose one wife may be regarded as a misfortune. To lose three looks like carelessness”.

<sup>182</sup> Note, once more, the slick transition from “system” to “actus reus” which had been evident in *Ball and Ball*.

Defence counsel further complained,<sup>183</sup> that in charging the jury, the trial judge had observed that:

. . . the occurrence of so many accidents benefiting him is such a coincidence that it cannot have happened unless it was design.

This was met with the telling response of the Lord Chief Justice that:<sup>184</sup>

. . . that. . . states exactly *the reason why the evidence is admissible*. (emphasis added)

The Court was only one step away from acknowledging the universal justification for the admission of *all* similar fact evidence properly so called, regardless of what category it might be seen to fall within, namely *its relevance to the direct case against the accused*. But so ingrained had the categories approach become in English judicial thinking that future courts took the strict *ratio* of *Smith* to be confirmation that, as in *Makin*, similar fact evidence might be admitted to prove “system” or “design” on the part of the accused.

What they were in truth recognising was that the evidence was admissible because of its startling factual relevance to the issue which the court had to decide. However, such was the prevailing philosophy that *Smith* became merely another ‘category’ of case in which similar fact evidence might be admitted, rather than a useful precedent for the employment of ‘lack of coincidence’ reasoning. The evidence was *specifically relevant* because it negated any possibility of coincidence; the ultimate key

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<sup>183</sup> At 233.

<sup>184</sup> *Ibid.*

to admissibility was therefore not “system”, “design” or “elimination of coincidence”, but *specific relevance to the facts of the case*. The narrow symptom was being mistaken for the underlying condition.

The subsequent use of this narrower precedent was no doubt based on the careful words of Lord Chief Justice Reading,<sup>185</sup> who read the unanimous decision of the Court in rejecting S’s appeal. His Lordship sidestepped the essential question raised in the legal arguments, in the following terms:

We think that that evidence was properly admitted, and the judge was very careful to point out to the jury the use they could properly make of the evidence. He directed them more than once that they must not allow their minds to be confused and think that they were deciding whether the murders of [B] and [L] had been committed; they were trying the appellant for the murder of [M].

With respect, it is difficult to avoid the conclusion that the jury were indeed being told to consider the possibility that B and L had been murdered, but *not* by means of “propensity reasoning”. The jury had *not* been instructed that S’s guilt of the murder of M might be reasoned from the assumption that he had murdered B and L. Rather, they were advised that the circumstances surrounding *all three deaths* eliminated the possibility that the one on the indictment was a tragic accident.<sup>186</sup> The evidence was admissible as showing a “design” on the part of S to feloniously dispose of unwanted wives in bathtubs, so as to benefit financially from their deaths. Implicit in this argument is the suggestion that M’s death was “designed” by the accused, as part of his “system”. However, there is clearly a fine line to be drawn between evidence of

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<sup>185</sup> At 237.

<sup>186</sup> This much was suggested to the jury by the trial judge when he is reported (at 233) as having observed that “. . . the occurrence of so many accidents benefiting him is such a coincidence that it cannot have happened unless it was design”. Expressed in another way, it amounts to a direction that “It would be strange indeed if all of these women died the same way by accident – therefore the accused must have killed them all”.

“design”, and the “circular reasoning” which the Court of Appeal was clearly anxious to avoid.

Even though the “system” or “design” which ensured Smith’s conviction was proved by the elimination of all other reasonable hypotheses, it had not occurred to anyone that *all* applications of similar fact evidence had this potential, and not just those which bore the hallmarks of what became the newly-created category of “lack of coincidence leading to proof of design”. Had the justification for the admission of such evidence been expressed in the *negative* (the *elimination* of coincidence), rather than the *positive* (the *presence* of factors suggesting “design”), then the penny might have dropped for future courts. As it was, the signal was both confused and confusing, even to academic observers.

Commenting, in 1923,<sup>187</sup> Ernest Williams concluded, of the cases heard up to and including *Armstrong*,<sup>188</sup> that:

Looking back over this list of cases it will surely be agreed that they display on the whole a continuation of the tendency to widen the area of admissibility of evidence of other offences, and so take away from the accused person the protection which in many cases would ensure his acquittal.

However, in response to this assertion, Julius Stone, writing at approximately the same time,<sup>189</sup> countered that:

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<sup>187</sup> Note 169, at p. 223.

<sup>188</sup> [1922] 2 KB 555, in which A’s guilt of the arsenic poisoning of his wife was established partly by reference to his attempt to dispose of a business rival by the same ‘system’.

<sup>189</sup> Note 59, at 976. Stone at least seems to have understood that *relevance* is the common factor in all situations in which similar fact evidence is admissible

. . . the area of admissibility is no wider today at common law than it was in 1692, in 1762, in 1791, or in 1851. All that has happened is that *new situations have arisen in which the evidence offered was relevant*. [emphasis added].

This exchange serves to confirm that even the academics had become confused as to what precisely was happening. Both authors were accurately summarising the law as it was at that stage in its development, but from different perspectives. It was still the law that similar fact evidence had to be relevant to the instant case in order to be admissible; however, lawyers were encountering new examples of that relevance almost on an annual basis. The door had now been opened for future Crown counsel to bolster what was at best only a “prima facie” case of *actus reus* against the accused with prejudicial similar fact evidence, in circumstances in which the *relevance* of that prejudicial evidence to the facts of the instant case was far less obvious than it had been in the *Smith* case itself.<sup>190</sup>

### **From “previous actions” to “pre-existing propensities”**

The admissibility of similar fact evidence to prove the identity of the offender which had been confirmed in *Perkins v Jeffrey*,<sup>191</sup> was extended only three years later to encompass, not only previous *actions* by an accused, but also evidence of their *propensities*. This time, the argument was along the lines of “There is no dispute that this offence occurred, and the issue for determination by the jury is who committed it. The Crown may employ similar fact evidence in order to prove to the jury that it bore all the hallmarks of a person with the propensities of the accused, in support of the allegation that the accused was in fact the offender on this occasion”.

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<sup>190</sup> See, e.g. *Kennaway* [1917] 1 K.B. 25 and *Lovegrove* [1920] 3 K.B. 643. See also *Armstrong*, note 188.

<sup>191</sup> Note 179.

The case in question was *Thompson v The King*,<sup>192</sup> in which T was charged with several sodomies involving a group of boys, and to each allegation his defence was that of alibi. The person responsible for the offences (on 16<sup>th</sup>) had made an appointment with the victims for the 19<sup>th</sup>, and on 19<sup>th</sup> T had met with the boys, told them that he had another appointment, and given them money. They then identified T, to a waiting police officer, as the person who had sodomised them on 16<sup>th</sup>. The “issue before the jury” was therefore clearly whether or not T was the man who had met with the boys and committed the offences on 16<sup>th</sup>. In support of its allegation that he had been, the Crown was allowed to adduce evidence that when apprehended on the 19<sup>th</sup>, T was in possession of powder puffs, and had indecent photographs of boys at his residence. T was convicted, and appealed to the House of Lords, where it was argued, on behalf of the Crown,<sup>193</sup> that the photographs of the boys were material to the issue of identification.

The “lead” judgment, of Lord Chancellor Finlay,<sup>194</sup> upheld the admission of the evidence, on the ground that:

What was done on the 16<sup>th</sup> shows that the person who did it was a person with abnormal propensities of this kind. . . . The criminal of the 16<sup>th</sup> and the prisoner had this feature in common, and it appears to me that the evidence which is objected to afforded some evidence tending to show the probability of the truth of the boys’ story as to identity.

It was hardly surprising that this ruling caused confusion for those observers who could not appreciate that the key to the admissibility of that evidence was not *solely* the *fact* of T’s propensities, but the inherent unlikelihood that in identifying

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<sup>192</sup> [1918] AC 221. In this case, *Perkins v Jeffrey* was cited, along with, *inter alia*, *Ball and Ball* (note 173) in support of Crown Counsel’s submission that the evidence at the trial had been correctly admitted.

<sup>193</sup> At 223.

<sup>194</sup> At 223-5, Lord Dunedin concurring. The suggestion that homosexual proclivities alone were sufficient to place the accused and the perpetrator in the same narrow sub-group of the population would later be corrected by a changed social climate; see *DPP v Kilbourne* [1973] AC 729. However, the principle lived on.



someone allegedly at random as their molester, the boys should have picked someone with such relevant tendencies.

This was barely alluded to directly in the case report itself, and the criticism which the case attracted was based on the belief that S had somehow been convicted on his propensity *alone*.<sup>195</sup> Once again, the highest court in the land had perpetuated confusion and misconception by failing to identify precisely the nature of the relevance to the facts of the case which made the evidence admissible.<sup>196</sup>

The increasing willingness of senior judges of this period to recognise new categories of admissibility of propensity evidence may have been a judicial reaction to a belief that the criminal trial process had, during the years since *Makin*, swung more in favour of an accused.

In its 1914 decision in *R v Christie*,<sup>197</sup> the House of Lords had ruled that some items of evidence, while technically and logically relevant to the case in hand, might lead to “unfairness” to an accused were they to be admitted into evidence. This appears to have been the first appreciation that somehow the two concepts of “probity” and “prejudice” must be balanced against each other, culminating in the re-formulation of the similar fact evidence rule in *Boardman*. The same considerations also inform decisions by trial judges as to whether or not to allow the “joinder” of indictment counts so as to reveal a multiplicity of alleged offences by an accused, and allow the evidence of one alleged victim of this course of behaviour to appear to corroborate the evidence of other(s). This formed the next chapter in the history of similar fact evidence under English law.

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<sup>195</sup> This misconception was no doubt materially encouraged by Lord Sumner’s now infamous homophobic diatribe at p. 235 of the case report.

<sup>196</sup> The Court of Criminal Appeal was afforded the opportunity to correct this misconception only a few months later, in *The King v Twiss* [1918] 2 KB 853. It failed to do so.

<sup>197</sup> [1914 A.C. 545; (1914) 24 Cox C.C. 249.

### Similar fact evidence from the joinder of indictment counts

The *Indictments Act 1915* (E & W), s 4, provided that two or more offences, even involving different complainants, could be joined on the one indictment if they were “offences of the same or similar character”.<sup>198</sup> However, under s 5(3), it was also provided that a trial judge could order separate trials if they were of the opinion that such a process could lead to the accused being “prejudiced or embarrassed” in their defence.

At least until *Bailey*,<sup>199</sup> in 1924, it seems that such “prejudice or embarrassment” was thought of only in terms of the complexity of the trial process thereby created, and little or no consideration was given to the potential prejudice to the accused of facing the same allegations from a whole series of different accusers before the same jury. The joinder of different counts in an indictment was not even perceived to *be* a form of similar fact evidence until a series of appeals revealed its potential in this regard. The later cases in this series in turn led the way to the re-formulation of the law in *Boardman*.

The first of these cases was *Bailey* itself, in which Lord Hewart C.J. observed that:<sup>200</sup>

It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an accusation which at least appears satisfactory.

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<sup>198</sup> This rule of law found practice expression under Rule 9 of the *Indictment Rules, 1971*.

<sup>199</sup> [1924] 2 KB 300. This case bore some similarity, on its facts, to the later watershed case of *Boardman* (note 9). However, the facts are less important than the observation of Lord Hewart C.J. in granting the appeal against conviction which resulted from the joinder of two indictment counts.

<sup>200</sup> At 306. The appeal against conviction was upheld in this case.

The alternative view was expressed by Talbot J in *Southern*,<sup>201</sup> as follows:

. . . as a matter of common sense, it is more likely, in fact, that a man should be guilty of filthy conduct on one occasion if he has been guilty of it on another.

The judicial climate on this issue eventually came to favour the Crown,<sup>202</sup> as the residual outcome of two of the leading similar fact evidence cases of the middle years of the century, *Rex v Sims*,<sup>203</sup> and *Noor Mohamed v The King*.<sup>204</sup> These two cases also revealed a fundamental split in judicial thinking which had developed since 1894 regarding how Lord Herschell's second, "inclusive", principle was to be interpreted. This created the need for clarification at the highest level which resulted in *Boardman*.

In *Sims*, S had been convicted of a total of three offences of a homosexual nature, following a trial in which four of his alleged victims had been allowed to testify to alleged events which disclosed S's homosexual propensities. His appeal was eventually heard by the Court of Criminal Appeal, before whom it was argued, on his behalf,<sup>205</sup> that "The effect of trying all the cases together was to make the jury say "This is a dirty old man because four different persons have given similar evidence about him"".

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<sup>201</sup> (1930) 22 Cr. App. R. 6, at 9. His Lordship nevertheless felt constrained to overturn the conviction which had resulted. This was fortunate, given that his observation was one of pure "propensity reasoning". For a more detailed analysis of the difficulties which can arise when two different allegations, although "similar" enough to be joined on the same indictment, do not enjoy a sufficient "nexus of similarity" to render one allegation admissible "similar fact evidence" in proof of the other, see Yale, "How many counts to an indictment?" 1975 Crim L R 428. See also *Ailes* 13 Cr. App. R. 173, in which during the trial, in 1919, of a cinema attendant for an alleged indecent assault upon a young girl attending the cinema, similar fact evidence had been admitted from another young girl alleging a similar assault.

<sup>202</sup> Even thirty years later, however, trial judges were still refusing joinder in cases of alleged sexual offences against young victims when it was felt that the combined emotive effect of such conjoined allegations could not be justified by reference to the apparent similarities between those separate allegations; see, e.g. *Fitzpatrick* (1963) 47 Cr. App. R. 16 and *Doughty* [1965] 1 WLR 331.

<sup>203</sup> [1946] 1 KB 531.

<sup>204</sup> [1949] AC 182.

<sup>205</sup> At 533.

Lord Goddard C.J. read the unanimous judgment of the Court rejecting S's appeal,<sup>206</sup> during the course of which he made the following general statement of law:

If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused.<sup>207</sup> ; *but if one starts with the general proposition that all evidence which is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view (emphasis added).*

The emphasised part of this judgment obviously had the effect of turning the originally perceived *Makin* principle on its head. Instead of requiring the Crown to justify the admission of similar fact evidence which was otherwise inadmissible by demonstrating that it was relevant to “an issue before the jury”,<sup>208</sup> it was being suggested that once it could be demonstrated that the evidence which the Crown was seeking to adduce was “logically probative”, then it was admissible regardless of the line of defence offered by the accused. The key to admissibility was, as with all other items of evidence, one of *relevance*, and the only perceivable heresy in this judgment was the failure to add the caveat that ‘relevance through propensity alone’ is insufficient.

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<sup>206</sup> At 539.

<sup>207</sup> This was, of course, the classic rationale of admissibility arising from the “narrow” interpretation of Lord Herschell’s second statement in *Makin*. The italicised portion of his Lordship’s ruling goes to the fundamental core of this thesis, and the rationale for the admission of all similar fact evidence – *it is admissible once its relevance is established, regardless of what ‘category’ of case is involved, and regardless of the label which may be attached to it*. It is, in short, an *inclusive* rule based on relevance, not an exclusive one with categories of exception.

<sup>208</sup> This was the “broader” interpretation of Lord Herschell’s “inclusive” rule in *Makin*, and the one in judicial favour at the time.

Applying the ‘inclusive’ principle thus identified to the facts of the case, his Lordship justified the admission of the evidence of each of the complainants on the basis of the “striking similarity” between each of the acts described and the others, adding that:<sup>209</sup>

The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are unlikely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming.<sup>210</sup>

In short, the overwhelming “probative force” (= *relevance*) of the evidence was the key to its admissibility.

The next case in the series gave equal emphasis to the potential *prejudice* which the admission of such evidence might also impose on an accused, thus laying the groundwork for what was to follow in *Boardman*. The Judicial Committee of the Privy Council (“JCPC”) in *Noor Mohamed* was sitting in an appeal from British Guinea by a man (N) who had been convicted of the murder of his de facto by potassium cyanide poisoning, after the jury had been allowed to learn of the death of his former wife from an identical cause two years previously. N had never been charged with this first death, and the JCPC ultimately quashed his conviction on the ground that this evidence should not have been admitted,<sup>211</sup> because it “offended against the principle” laid down in the first statement of Lord Herschell’s judgment in *Makin*, namely that a person should not be convicted solely on evidence which reveals the mere fact that they have offended before.

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<sup>209</sup> At 540.

<sup>210</sup> This simultaneously highlights the need to be extra vigilant, in such cases, to eliminate “collusion”, as it is now more commonly called. It is also, of course, yet further endorsement of the ‘elimination of coincidence’ approach.

<sup>211</sup> According to the Headnote, *ibid*.

The judgment of the Committee was delivered by Lord Du Parcq, who first re-affirmed the pre-eminence of that first statement,<sup>212</sup> then went on to impose another caveat,<sup>213</sup> namely that:

. . . the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it . . . cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.<sup>214</sup>

With reference to the *dictum* of Goddard C.J. in *Sims* quoted in note 206, his Lordship observed that:<sup>215</sup>

The expression “logically probative” may be understood to include much evidence which English law deems to be irrelevant. Logicians are not bound by the rules of evidence which guide English courts. . . .

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<sup>212</sup> At 190. His Lordship noted, in passing, that this first statement had been described by Lord Chancellor Sankey in *Maxwell v DPP* [1935] A.C. 309 at 317 as “one of the most deeply rooted and jealously guarded principles of our criminal law”, and one which was “fundamental in the law of evidence as conceived in this country”. Having given examples of when evidence of the mere *charging* of a man (as opposed to his conviction) might be admissible in later proceedings, his Lordship had added, at 321, that “. . . these instances all involve the crucial test of relevance”.

<sup>213</sup> This appears to have been the first ruling by an English appeal court to seek to weigh “probity” against “prejudice”.

<sup>214</sup> At 192.

<sup>215</sup> At 194-6. See also *Rex v Hall* [1952] 1 KB 302, in which the Court of Appeal confirmed that a mere plea of Not Guilty, and nothing more, entitled the Crown to lead similar fact evidence in relation to facts alleged in the instant trial for which the accused claims to have an innocent explanation.

In short, while relevance is ultimately the key to the admissibility of similar fact evidence, something *more* may be required than what might be termed ‘bare relevance’.

*Sims* and *Noor Mohamed* were considered again that same year, this time by the House of Lords in *Harris v DPP*,<sup>216</sup> in which the ‘categories of exception’ approach was once more rejected in favour of a more ‘general principle’ approach.

The facts of the case were complex, and are of no illustrative value, but on appeal, it was argued on H’s behalf that the evidence in question was not admissible under any of the “five recognised heads” justifying its admission.<sup>217</sup> It was further urged that these categories could not be added to (as here, to negative a defence of “coincidence”), and that the House should resist any further attempts to erode the basic principle laid down in *Makin*. Finally, it was argued, on the authority of *Bailey*,<sup>218</sup> that the trial judge should have instructed the jury to consider the evidence on each count separately.

Viscount Simon delivered the majority view of the House, quashing the conviction. In so doing, he said that:<sup>219</sup>

In my opinion, the principle laid down . . . in *Makin*’s case remains the proper principle to apply, and I see no reason for modifying it . . . *It is, I think, an error to attempt to draw up a closed list of the sorts of cases in which the principle operates: such a list only provides instances of its general application, whereas what really matters is the*

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<sup>216</sup> [1952] A.C. 694.

<sup>217</sup> At 697-8. These were identified as (a) to prove system; (b) to rebut a defence of accident or mistake which was “raised, raisable or open”, as established by the modification of the decision in *Sims* by the subsequent decisions in *Noor Mohamed* and *Hall*; (c) to rebut a defence of innocent intent; (d) to show “vicious or unnatural propensity”, and (e) to negative a defence of mistaken identification. Clearly, the ‘categories’ approach had proved to be very productive by this stage, even if it was the *wrong* approach.

<sup>218</sup> Note 199.

<sup>219</sup> At 705.

*principle itself and its proper application to the particular circumstances of the charge that is being tried.* It is the application that may sometimes be difficult, and the particular case before the House illustrates that difficulty. [emphasis added; footnote omitted].

Finally, someone in high judicial office had acknowledged that Lord Herschell's second statement of law in *Makin* had been intended as illustrative, rather than prescriptive. His Lordship then added that:<sup>220</sup>

. . . the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal.

There is a second proposition which ought to be added . . . [which] flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed because its probable effect "would be out of proportion to its true evidential value"

<sup>221</sup> . . . Such an intimation rests entirely within the discretion of the judge.

The confusion which had previously surrounded the question of how "relevant" similar fact evidence required to be before it became admissible was deftly lifted by the following distinction:<sup>222</sup>

. . . evidence of "similar facts" should be excluded unless such evidence has *a really material bearing* on the issues to be decided. (emphasis added).

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<sup>220</sup> At 706-9

<sup>221</sup> Citing Lord Moulton in *Christie* at Cox, p. 257; see note 197.

<sup>222</sup> At 710.



Writing in the years between *Harris* and the next leading case of *Kilbourne*, English law's leading scholar in this area, at that time,<sup>223</sup> emphasised the significance of “striking similarity” between the facts alleged on the indictment and the facts sought to be admitted when he made the following observation regarding the decision in *Sims*.

The similar fact evidence was admissible because there were specific features which made each accusation bear a striking resemblance to the others . . . not only was the accused given to committing the crime charged, but he was also given to doing it according to a particular pattern.<sup>224</sup>

“Striking similarity” appeared to have become the touchstone of ‘admissibility through relevance’, and the impossibility of overlooking the striking similarity which had justified the admission of the evidence in *Smith*,<sup>225</sup> and was emphasised by Cross some fifty years later, had also ruled the day in *Straffen*,<sup>226</sup> in the same year as *Harris*. In *Straffen*, the similar fact evidence consisted of homicidal acts, by the accused,<sup>227</sup> which were so uniquely distinctive that, as in *Smith*, it is difficult to believe that any injustice could have arisen from their admission, even though there was no specific defence raised to the charge, and the evidence in question had been admitted purely in rebuttal of S’s simple “Not Guilty” plea.

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<sup>223</sup> Cross, *Evidence*, 3<sup>rd</sup> ed. (1967) at p. 319.

<sup>224</sup> Writing almost a decade later (in [1975] Crim L R 62, at 68-9), the same author cited *lack of* “striking similarity” as the reason for the Court of Criminal Appeal decisions in *Chandor* (1959) 43 Cr. App. R. 74 and *Flack* (1969) 53 Cr. App. R. 166.

<sup>225</sup> Note 180.

<sup>226</sup> [1952] 2 QB 911. In that case, a little girl was found strangled, with no sign of sexual assault, and no attempt to hide the body, which could easily have been done in the circumstances. S had earlier that day escaped from a nearby criminal lunatic asylum, where he had been sent for two killings committed in circumstances identical to those relating to the latest victim. He had been in the vicinity at the time of the girl’s death. These facts were made known to the jury, and in particular the trial judge held that evidence of S’s previous offences was admissible “to establish the identity of the murderer”. S was convicted of the fresh murder, and his subsequent appeal was dismissed.

<sup>227</sup> N.B. that these previous killings had never been proved against D beyond reasonable doubt, since ahead of his first trial he had been found unfit to plead due to insanity.

In the years immediately prior to *Boardman*, therefore, “striking similarity” became the new mantra of admissibility. But, like the “defence otherwise open to the accused” which had dominated legal thinking after *Makin*, it was only a symptomatic example of something more fundamental, namely *the strong suggestion of guilt as the result of the application of “the doctrine of chances”*. By exchanging one mantra for another, the courts were no nearer to acknowledging what Wigmore had identified almost a century earlier.

### **Similar fact evidence as corroboration – the final step towards *Boardman***

Three cases at appellate level, prior to 1975,<sup>228</sup> involved the issue of what might constitute “corroboration” of the trial testimony of an alleged child victim of sexual abuse, when this is required either as a matter of law or as a rule of practice. In *Campbell* it was held by the Court of Criminal Appeal that the sworn evidence of one such victim could corroborate the sworn evidence of another,<sup>229</sup> and in the course of rejecting C’s appeal, Goddard C.J. observed that:<sup>230</sup>

. . . a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story.

There was no reference to any need for a “striking similarity” between such testimonies before they might be admitted; nor does the case report suggest that any

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<sup>228</sup> *R v Campbell* [1956] 2 QB 432, *DPP v Hester* [1973] AC 296 and *DPP v Kilbourne* (Note 194).

<sup>229</sup> This was required as a matter of practice, since each of the victims was a child under 16 whom C was accused of indecently assaulting in his capacity as their schoolteacher.

<sup>230</sup> At 439.

existed. What was being impliedly accepted was the lack of coincidence inherent in a “succession” of allegations against the same accused, even though the gory details were not identical. The same underlying logic was implicit in the House of Lords ruling in *Hester*, that:

The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. . . . Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence.

The further implications which arise when mutual corroboration occurs between two witnesses who are themselves both victims of alleged crimes by the accused which are joined on the same indictment were addressed by the House in the third case in the series, *Kilbourne*.<sup>231</sup>

In that case, the essential question was whether or not evidence of “system” on the part of an alleged sexual predator against young boys could constitute corroboration of the sworn evidence of each of these victims. It was the unanimous opinion of the House that it could, and this was most succinctly expressed by Lord Reid,<sup>232</sup> in the following terms:

Once there are enough children to show a “system” I can see no ground for refusing to recognise that they can corroborate each other.

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<sup>231</sup> Note 194.

<sup>232</sup> At 751. All their Lordships drew heavily on the logic behind leading Scottish authorities such as *Moorov v H.M. Advocate* and *Ogg v H.M. Advocate* which are considered in Chapter 7. Lord Reid also expressed the view that the evidence of only two such children would be insufficient to establish “system” on the part of an accused. Even at this late stage, it would seem that the ‘categories’ approach was still being followed, hence the admission of the evidence to prove “system”, rather than a recognition of its relevance through lack of coincidence.

The Court was at pains to emphasise that in such cases, great care should be taken to exclude the possibility of collusion between the witnesses.<sup>233</sup> In the course of his judgment, Lord Simon expressed the true test for the admissibility or otherwise of similar fact evidence in terms which were to be echoed by the House only two years later in *Boardman*. Having quoted Lord Herschell's seminal words in *Makin*, he continued:<sup>234</sup>

All relevant evidence is prima facie admissible. The reason why the type of evidence referred to by Lord Herschell in the first sentence of the passage is inadmissible is, *not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted: the law therefore exceptionally excludes this relevant evidence: whereas in the circumstances referred to in the second sentence the logically probative significance of the evidence is markedly greater.* [emphasis added].

The significant conceptual breakthrough which occurred here is partly masked by the terminology employed. His Lordship's words echo the 'old' statement, per *Makin*, that similar fact evidence is not admissible solely to demonstrate propensity. However, unlike *Makin*, it explains *why*. *It is insufficiently relevant*. In an important sense, the reference to prejudiciality is a red herring. "Propensity" reasoning is not inadmissible because it is unduly prejudicial; *it is unduly prejudicial because it lacks logical relevance*.

However, this failure, at a later stage in the development of similar fact evidence law, to drill down deeply enough into the *raison d'être* of the exclusion of propensity reasoning, was to colour what followed in *Boardman*.

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<sup>233</sup> See, e.g. Lord Hailsham at 748 and Lord Reid at 750.

<sup>234</sup> At 757.

***Boardman* – “intellectual breakthrough” or “fumbled pass”?**

Although the next House of Lords ruling, in *Boardman*,<sup>235</sup> was to have such a profound influence on the admission test for similar fact evidence, factually it appeared to be a logical successor to *Campbell* and *Hester*.<sup>236</sup> B was the headmaster of a boarding school who had been convicted of sodomy offences involving two of his pupils, S and H. His counsel had not sought separate trials, and the trial judge had directed the jury that the sworn evidence of S was admissible in relation to the charge involving H, and vice-versa. It was this ruling which was the subject of an eventual appeal to the House of Lords. It was never suggested that the boys had got together to concoct their stories, and there were certain similarities in their allegations which B’s evidence failed to explain away.<sup>237</sup>

While denying the suggestion that homosexual preferences were in themselves sufficient to provide a “strong nexus of similarity”, the House of Lords dismissed B’s appeal because of the similarities between the unusual facts narrated by each boy, together with the implausible reasons given by B for having woken them up in the first place.

In the event, the long-term importance of the decision in *Boardman* for the development of this area of the law lay not in the decision arrived at on the facts,<sup>238</sup> but

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<sup>235</sup> [1975] AC 421.

<sup>236</sup> See note 228 for both case references.

<sup>237</sup> In each case, for example, B had woken the boy in the dormitory in the early hours of the morning, and had taken him to his own room, where he had attempted to persuade each of them to take the ‘active’ role in the intended sodomy.

<sup>238</sup> This decision would appear to have been unexceptional in itself, given the noticeable trend towards admitting this type of evidence in this type of case, but it was not without its critics even on its facts. See, e.g. Tapper, “Similar Facts: Peculiarity and Credibility”, (1975) 38 Modern Law Rev. 206, who claimed (at 208) that none of the admitted evidence from the two complainants who were allowed to

in the re-statement of the governing principles underlying the reception of propensity evidence. Under the *Makin* formulation of the rule, it had previously been a prerequisite for the admission of such evidence that the party seeking its admission point to some “issue before the jury” to which it was relevant. The new formulation was in terms of what has been called a “total issue” test.<sup>239</sup> Unfortunately, and with respect, it proved to be the *wrong* test.

Lord Cross, reflecting the majority view of the House,<sup>240</sup> said of the circumstances in which “similar fact evidence” might be admitted that:

Circumstances . . . may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense.<sup>241</sup> . . . The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it. In the end – although the admissibility of such evidence is a question of law, not of discretion – the question as I see it must be one of degree.<sup>242</sup>

The reference to “a question of law” appears to have been an attempt to make judicial decisions on admissibility directly appealable. This is of crucial importance, because the erroneous admission of propensity evidence of any sort against an accused can be fatal to a fair trial, and productive of a miscarriage of justice. Such a

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corroborate each other displayed any “striking similarity” with that of the other. Even Lord Wilberforce, in the House of Lords (at 445) admitted to “. . . some fear that the case, if regarded as an example, may be setting the standard of “striking similarity” too low”. Nonetheless, it has always been assumed that in this case, “striking similarity” existed between the allegations of the two victims.

<sup>239</sup> By Roberts, “Evidence, Proof and Practice”, Lawbook Co (Sydney), p. 309.

<sup>240</sup> At 456-457.

<sup>241</sup> He cited *Straffen* (note 226) as a good example of such a circumstance.

<sup>242</sup> His Lordship further asserted that this had been stated by the Criminal Law Revision Committee, in its 11<sup>th</sup> Report, to be “the existing law”. This Report is considered in Chapter 4.

fundamental error is less easy to appeal if it is seen simply as an unwise exercise of a discretion.

At the same time, there was no question of dispensing with the discretion given to every trial judge to exclude evidence when it would be “unfair” to admit it. This discretion had been granted to trial judges by the House many years earlier in *Christie*.<sup>243</sup> Its survival, despite the creation of a new rule of law based on admissibility through relevance, was confirmed by Lord Salmon, in the following terms:<sup>244</sup>

If a trial judge rightly rules that the evidence is relevant and admissible, he still, of course, has a discretion to exclude it on the ground that its probative value is minimal and altogether outweighed by its likely prejudicial effect.

However, before this discretionary power could be factored into a re-statement of the law, it was first necessary to establish the logical basis for admissibility. The prerequisite for the admissibility of *all* evidence being its *relevance*,<sup>245</sup> it is perhaps not surprising that Lord Goddard’s suggested approach to the issue, in *Sims*,<sup>246</sup> was adopted by their Lordships in *Boardman*,<sup>247</sup> who took the opportunity to re-cast it in the following terms:<sup>248</sup>

*The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by*

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<sup>243</sup> Note 197. This same principle was described by Lord Hailsham, at 451, as “ . . . a rule of English law which has its roots in policy, and by which . . . logicians would not be bound”.

<sup>244</sup> At 463.

<sup>245</sup> See, e.g. Cross on Evidence (8<sup>th</sup> Australian Edition, 2010) at [1485].

<sup>246</sup> See note 203.

<sup>247</sup> As it already had been in *Kilbourne*; see note 194. N.B. also Lord Hailsham in the instant case, who observed, at 450, that “*Sims* was never in need of support, for . . . it was only a particular example of a general principle which stems from *Makin* . . . .”

<sup>248</sup> Per Lord Wilberforce, at 444. “Logical probity” appears to have become “probative force”.

the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses<sup>249</sup> or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s). (emphasis added).

Here, once again, was clear acknowledgment of the fact that what gives similar fact evidence properly so called its logical appeal in some cases is *its ability to eliminate coincidence*. Once coincidence is eliminated, then “when [the circumstances are] judged by experience and common sense”, the true relevance of those similar facts becomes so obvious that it would be “an affront to common sense” not to employ them in reasoning towards guilt. In the context of the instant case, different (and proven independent) witnesses would not give such an identically detailed account of events unless those events had really happened. In these circumstances, it had been appropriate for the trial judge not only to allow the various allegations to be tried together, but also to allow each of the complainants/witnesses to corroborate each other.

The same conclusion had already been arrived at in a series of Scottish cases<sup>250</sup>, in which the “underlying unity” of the detailed complaints made by each victim of a series of criminal acts was said to supply the necessary corroboration required under Scots criminal law before a guilty verdict might be entered. However, the principle being laid down in *Boardman* went much deeper than that, and was capable of much broader application. As one learned commentator said,<sup>251</sup> of the portion of Lord Wilberforce’s judgment emphasised by the author above, “That, in a nutshell, is the *ratio decidendi* of *Boardman*.”

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<sup>249</sup> His Lordship is taken to have been referring here to what we today call “collusion”. This is certainly how his words were subsequently interpreted; see, e.g. Lord Mackay in *DPP v H*, note 294.

<sup>250</sup> See *Moorov v H.M. Advocate*, *H.M. Advocate v A.E* and *Ogg v H.M. Advocate*, all of which are considered in Chapter 7. Lord Hailsham ruled, at 456, that “ . . . there is no relevant difference in this context between the English doctrine of corroboration and the Scottish doctrine as defined in *Moorov* . . .”

<sup>251</sup> Hoffman, (note 25), at 194-5.



At the same time, future courts were warned to avoid either (a) finding that “strong degree of probative force” simply in “forbidden reasoning”,<sup>252</sup> along the lines of ‘Once a thief, always a thief’, or (b) admitting such evidence when to do so would be to invite a finding of guilt which in the circumstances would be “unsafe or unsatisfactory”. Henceforth, the test was to be whether or not the similar fact evidence offered by the Crown possessed “a strong degree of probative force”,<sup>253</sup> and *not* whether or not it could be made to fit into one of the categories already approved for the admission of such evidence, as had previously been the perceived requirement under the *Makin* test.

As Lord Salmon put it, most succinctly:<sup>254</sup>

The test must be: is the evidence capable of tending to persuade a reasonable jury of the accused’s guilt on some ground *other than* his bad character and disposition to commit the sort of crime with which he is charged? [emphasis added].

It was unfortunate that the opportunity was not taken, at this point, to underline precisely *why* “propensity reasoning” was not to be encouraged. It is because *propensity alone is insufficiently relevant to justify reasoning towards guilt*. Even in those circumstances in which it appears to have been allowed,<sup>255</sup> it is not the *fact* that the accused has done it before which is relevant, but the *specific circumstances in which they have done it*.

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<sup>252</sup> Per Lord Hailsham at 453.

<sup>253</sup> This test was clearly being offered as a replacement for the bare “logical probity” test suggested in *Sims*, which had provoked such semantic outrage in some quarters.

<sup>254</sup> At 462.

<sup>255</sup> For example, in *Straffen*; see note 226.

Subsequent confusion was also created by the failure to spell out that the lack of sufficient relevance possessed by pure propensity evidence is also the key to its prejudicial effect. “Probative value” and “prejudicial effect” are not two discrete concepts which occasionally collide; *the one flows from the other*. Allowing a jury to be advised of an accused’s propensity when it has no real relevance to the facts of the case leaves open only one use which they can make of it – namely “forbidden reasoning”. *Lack of relevance is the cause of prejudicial effect; if the evidence is sufficiently relevant to be admitted for the right reason, then there can be no prejudice.*

The failure to emphasise this point resulted in yet another suggested test which relied on categorisation, although henceforth there would be only two categories; “propensity reasoning” and “non-propensity reasoning”. Propensity reasoning was labelled as “forbidden” by Lord Hailsham, who handed down the new test in the following passage of his judgment:<sup>256</sup>

If there is some other relevant, probative purpose [for admission] than for the forbidden type of reasoning, the evidence is admitted, but should be made subject to a warning<sup>257</sup> from the judge that the jury must eschew the forbidden reasoning. The judge also has a discretion, not as a matter of law but as a matter of good practice,<sup>258</sup> to exclude evidence whose prejudicial effect, though the evidence be technically admissible on the decided cases,<sup>259</sup> may be so great in the particular circumstances as to outweigh its probative value to the extent that a verdict of guilty might be considered unsafe or unsatisfactory . . .

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<sup>256</sup> At 453.

<sup>257</sup> This would eventually become known as a “propensity warning”.

<sup>258</sup> This would eventually harden into “a matter of law”. It may, of course, be argued that if the trial judge applies the correct admission test as a matter of *law*, then there will be no need to exclude the same evidence as a matter of practice, because there will *be* no prejudice.

<sup>259</sup> This appears to have been a curious affirmation of the old ‘case method’ approach which had caused such difficulty after *Makin*, and had led to the need for a comprehensive restatement of the underlying principles involved in these cases.

This was the formal birth of the “probity versus prejudice” concept which was to dominate the approach of the courts towards similar fact evidence for the remainder of the century, and it was unfortunate that his Lordship did not see fit to define either “probity” or “prejudice” in this context.

A moment’s reflection reveals that, in a broadly general sense, the more “probative” an item of evidence is in support of a Crown case, the more “prejudicial” it is *to the accused’s prospects of an acquittal*. This conundrum was to baffle lawyers for many years, until it was finally agreed that “prejudice” in the context of propensity evidence meant “used for the wrong purpose” (= *unfair*), and was in reality nothing more than an additional exhortation not to employ the “forbidden reasoning” identified by Lord Hailsham,<sup>260</sup> which equated guilt on a former occasion with guilt on the present occasion without some additional factor(s) which linked the two events in a way which gave the previous events enhanced relevance to the new allegations.

But it would have made the subsequent history of the law in this area less complex had the simple point been conceded that *all evidence adduced against an accused is meant to be prejudicial; the task of a trial judge is to ensure that it is not “unfairly” prejudicial*. The true “prejudice” which the House was seeking to avoid was “unfair” prejudice, and this arises from the use of propensity evidence for the wrong reason. That wrong reason is its admission for a purpose which is *insufficiently relevant to the issues raised in the case*.

The more fundamental omission was of any definition of “probity”. Although it may be, as Lord Cross opined,<sup>261</sup> “a question of degree”, it was, with respect, not enough simply to imply that the facts of each case would themselves reveal how much

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<sup>260</sup> See note 252.

<sup>261</sup> Note 242.

“degree” was involved. *The factors which have to be considered when arriving at an estimate of “probative value” had not even been identified, let alone enumerated.* The result was that *Boardman* left in its wake a perception that somehow it was possible to assess the admissibility of similar fact evidence by means of a set of theoretical scales, into one side of which was loaded the “probity” of the proffered evidence, to be weighed in the balance on the other side by its “prejudiciality”.

The failure, at the same time, to appreciate the precise nature of that prejudiciality – namely *the use of similar fact evidence for the wrong (“unfair”) purpose, the “ambushing” of an accused with evidence they have not come to court prepared to defend, and the confusion, through complexity, of the issues which the jury has to consider* - doomed the suggested formula to failure. As long as “probity” is thought of as being a measure of the degree of likelihood of the accused’s *guilt*, while “prejudice” is focused on the likelihood of *conviction*, one will always be measuring the same commodity twice. Put another way, whatever is loaded into the scales, they will remain in balance, and one side cannot be seen to carry any more weight than the other. “Probity versus prejudice”, without adequate judicial clarification, was likely to generate nothing more startling than the discovery that 2 kgs. of carrots weigh the same as 2 kgs. of onions.

The long-term problems generated by the failure to define either “probity” or “prejudice” accurately were still being experienced twenty years after *Boardman*, and at the highest levels.<sup>262</sup> However, in the final analysis, *Boardman* cannot be dismissed simply as merely the substitution of one unworkable test for another. Its most lasting legacy was to remove the uncertainty which had developed regarding the true nature of the *Makin* test, to cancel out the conflict which had arisen within the case-law which

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<sup>262</sup> For example, the majority judgment of the Australian High Court ruling in *Pfennig v The Queen* (note 10), per Mason CJ, Deane and Dawson JJ, at 477, which was in turn to generate its own problems within its own jurisdiction, took the *ratio* of *Boardman* to be “whether the prejudice to the accused is outweighed by the probative force of the evidence.” This case is further considered, in more detail, at note 564.

had attempted to follow the ‘general rule subject to exceptions’ approach and above all, to take one more step towards the identification of the appropriate test.<sup>263</sup>

### **Academic reaction to *Boardman***

The academic euphoria which greeted the publication of the judgments in *Boardman* probably owed much to the fact that the era of categorisation was apparently at an end. Academic lawyers had long been complaining of the growing complexity of the law which had developed post-*Makin*,<sup>264</sup> and were no doubt deceiving themselves that it had been simplified. Sir Leonard Hoffman<sup>265</sup> described *Boardman* as both “. . . an intellectual breakthrough”,<sup>266</sup> and “. . . by far the most important decision on similar fact evidence since *Makin*. . . .”. He applauded the demise of what he described,<sup>267</sup> as “the categories of relevance” approach, observing that “The test is simply whether the evidence has, on the facts of the case, a sufficiently high degree of probative force”.

He expressed no concern that their Lordships had offered no guidance on how precisely it might be determined that the probative force *did* possess the appropriate “high degree”. However, that point was not lost on others, and it was not long before observers began to realise that they had been short-changed. Only ten years after *Boardman*, one academic,<sup>268</sup> was enquiring “If . . . evidence can be given of the

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<sup>263</sup> As Lord Morris observed in *Boardman* (at 441), all the case-law which had preceded it had simply been “guides to principle”, and that principle had now been re-formulated.

<sup>264</sup> See, e.g. Wigmore, *Evidence* (3<sup>rd</sup> ed, 1940), vol.ii, §302, who had complained of a “vast morass of authority”, which rendered it “. . . hopeless to attempt to reconcile the precedents”. Cross [1973] Crim L R 400, at 401, observed that “. . . even the most wholehearted admirer of the status quo might be disposed to question the good sense of some of the decisions”.

<sup>265</sup> Note 25, at 193.

<sup>266</sup> In fact, the *Boardman* test was not even original. A whole legal generation earlier, Cowan and Carter (note 1, at 160) had suggested that “Admissibility in an individual case ought to be determined by balancing these two highly complicated and varying factors, probative value and undue prejudice”.

<sup>267</sup> *Ibid*, at 200.

<sup>268</sup> Allan, “Similar Fact Evidence and Disposition: Law, Discretion and Admissibility”, (1985) *Modern Law Rev.* 253, at 261.

defendant's disposition in order to prove his guilt of the crime charged,<sup>269</sup> what standard of cogency must such evidence satisfy?"

The same author also gave voice,<sup>270</sup> to the ongoing confusion between "probity" and "prejudice" which *Boardman* had created by suggesting that they were somehow to be measured in the balance without regard to the *purpose* for which the evidence was being admitted. Thus:

... the danger is that the jury will... mistakenly think that they can draw conclusions from their view of the defendant's character. This is a danger which will vary from case to case. The more remote the danger becomes, the lower will be the degree of relevance which can be accepted as satisfying the test for admissibility. The standard of "positive probative value" to be met will depend upon the seriousness of the risk of prejudice.

With respect, the "standard of positive probative value" does not depend upon "the risk of prejudice". The "risk of prejudice" is eliminated by the "positive probative value" of *the reason for which the evidence is admitted*.<sup>271</sup>

If the academics were confused, it was unlikely that the practitioners would fare any better. As it transpired, they did not.

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<sup>269</sup> Clearly, *Boardman* had failed to clarify the most fundamental point of all, namely that "disposition" *per se* is *insufficiently* relevant. Even that most respected academic Cross ("Fourth Time Lucky – Similar Fact Evidence in the House of Lords", [1975] Crim L R 62, at 63) was still, even after *Boardman*, citing *Straffen* and *Ball and Ball* for the assertion that propensity alone had sufficed in some past cases.

<sup>270</sup> Note 268, at 262.

<sup>271</sup> If, for example, a masked armed robber accidentally leaves, at the crime scene, an appointment card from his probation officer which contains his name and address, is the jury more likely to be influenced by the identification of the robber thereby provided, or the fact that he was on probation for some unspecified offence at the time? The probative value of the information on the card, *for the purpose for which it is admitted*, clearly overpowers any marginal prejudice which the disclosure of the accused's probationary status might generate. See also Zuckerman, "Similar Fact Evidence – the Unobservable Rule", (1987) 103 Law Quarterly Rev. 182, at 194.

## Conclusion

The essential importance of *Boardman* in the history of similar fact evidence is that it administered the formal death sentence to the suggestion that its admissibility was dependent upon its fitting within a pre-ordained and judicially approved category of case.<sup>272</sup> *Boardman* forced trial advocates to focus instead on *how* such evidence might be seen to be so relevant that its “probative value” overrode any “prejudicial effect” it might possess. The failure to insist on this in previous cases had almost entirely obscured the fact that the key to the admissibility of similar fact evidence is its *relevance*.

Following *Boardman*, the admissibility of similar fact evidence was more appropriately to be assessed from a starting point of “relevance”, subject to judicial caveat regarding its likely prejudicial effect. The challenge for future lawyers was to accurately identify what was legitimate, and what was not; this, in turn, required them to accurately identify the “relevant, probative purpose” for which they were seeking to have similar fact evidence admitted.

The court was then to determine whether the *degree of relevance* was enough to override its prejudicial effect. It was inevitably to do so as a question of *law*, rather than by exercising a residual discretion to exclude anything which might be too prejudicial, because ‘admission via relevance’ would eliminate any “unfairness”. Any alleged failure to apply the correct test would therefore be readily appealable.

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<sup>272</sup> As one observer (Carter, “Forbidden Reasoning Permissible: Similar Fact Evidence A Decade after *Boardman*”, (1985) 48 Modern Law Rev. 29 at 36) put it ten years after *Boardman*, “It is no longer necessary for a judge to seek out a specific escape route from a supposedly inflexible rule of exclusion”.

But even this apparently simplified process was to generate problems of its own. The sun had not yet set on the 'categories' approach; it had simply been temporarily eclipsed by what seemed to be a better way forward.



## Chapter 4:

### English law from *Boardman* to statutory categories of admissibility

#### Chapter synopsis

“Probity versus prejudice” turned out to be easier to state than to implement. The appellate courts subsequent to *Boardman*, having failed to accurately define “probative value”, did not even *attempt* to further elaborate on “prejudicial effect”. By the turn of the millennium, there was, in any case, a growing political perception that the existing law facilitated too many acquittals, and that this trend might only be reversed by allowing criminal juries to learn more about the unfavourable antecedents of those on trial.

Policy finally prevailed over principle, in the form of the *Criminal Justice Act 2003* (E &W). Its provisions returned the nation to a ‘categories’ regime which had its roots in a policy designed to facilitate, and legislatively justify, the admission of ‘bad character’ evidence for a greater number of purposes than the common law had ever sanctioned.

This concentration on ‘relevance for a specified purpose’ was at the expense of any consideration of ‘prejudicial effect’, and the prospect of any balanced score-card in such matters disappeared. In particular, there was still no overt recognition of the fact that the more overwhelming the probative value of an item of evidence used for the *correct reason* (as opposed to admitted for a statutorily prescribed *purpose*), the less is the risk that a properly directed jury may use it for the *wrong* reason.

### The attempt to define “probity”

The emphasis placed by their Lordships in *Boardman* on the need to balance “prejudice” against “probity” resulted in a search for measurable levels of the latter, without any corresponding attempt to define “prejudice”. The only question being asked was “How *probative* must the evidence be before it will be admitted?”

For at least the next decade, the appeal courts resorted to what Zuckerman, in 1987,<sup>273</sup> labelled “catch phrases” in relation to the “probity” half of the new equation. Initially it was seen as a choice between “striking similarity” and “probative force”, both of which phrases had been employed in *Boardman*. It appears not to have occurred to anyone during the early stages of this process that “striking similarity” was a *source of* “probative force”, rather than *an alternative to it*. Neither did any court at a persuasive level appear to perceive the need to identify the *factors* involved in assessing probity.

At first, the emphasis at Court of Appeal level was on “striking similarity”,<sup>274</sup> until differently constituted benches of the same Court began to require that the “similar fact evidence” be “positively probative in regard to the crime now charged”.<sup>275</sup> To further confuse matters, Scarman LJ, delivering the judgment of the Court of Appeal in

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<sup>273</sup> Note 271, at 194.

<sup>274</sup> For example, in *Mustafa* (1976) 65 Cr. App. R. 26, the Court of Appeal said that *Boardman* had established that “. . . for similar fact evidence to be admissible there must be a striking similarity between the evidence sought to be adduced and the offences alleged.” This was re-affirmed at the same level in both *Novac and Ors* (1976) 65 Cr. App. R. 107 and *Johannsen* (1977) 65 Cr. App. R. 101.

<sup>275</sup> *Rance and Herron* (1976) 62 Cr. App. R. 118, at 121. This test was reaffirmed in *Mansfield* (1977) 65 Cr. App. R. 276, *Neale* (1977) 65 Cr. App. R. 304 and *R v Clarke* (1978) 67 Cr. App. R. 398.

*Scarrott*,<sup>276</sup> categorised “striking similarity” as only one route towards a broader test, when he observed that:<sup>277</sup>

Hallowed though by now the phrase “strikingly similar” is . . . it is no more than a label. . . it is not to be confused with the substance of the law which it labels . . . evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is *positively probative* in regard to the crime now charged . . . (author’s emphasis).

The suggestion that “striking similarity” is, in fact, only one species of the broader genus “positive probity” was picked up by a leading English academic of the time, Professor Elliott.<sup>278</sup> Noting, first,<sup>279</sup> that the phrase “striking similarity” had been originated by Lord Goddard in *Sims*,<sup>280</sup> had met with House of Lords approval in *Kilbourne*,<sup>281</sup> and had then been “approved in nearly all the speeches in *Boardman*”,<sup>282</sup> Elliott made the telling, point, which was not, however, original,<sup>283</sup> that “. . . “striking similarity”, valuable as the phrase is, cannot deal with absolutely everything in the field”

A decade had passed after *Boardman* before it began to dawn upon commentators that any assessment of probity was bound to be *contextual* in nature, in the sense that the evidence which the Crown was seeking to admit required to be considered in the context of *the Crown case as a whole*. It is not the contested evidence

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<sup>276</sup> (1977) 65 Cr. App. R. 125. It was typical of the misconception which now surrounded the topic that observers assumed that his Lordship was substituting one test for another

<sup>277</sup> At 129-130.

<sup>278</sup> “The Young Person’s Guide to Similar Fact Evidence – 1”, [1983] Crim L R 284.

<sup>279</sup> *Ibid*, at 286.

<sup>280</sup> Note 203, at 539.

<sup>281</sup> Note 194, at 738.

<sup>282</sup> Note 235. In fact, in that case, Lord Morris (at 441) had cited “striking similarity” as merely one way of demonstrating “underlying unity”, while Lord Wilberforce (at 444) referred to it as supplying what he called “probative force”. The perception that “striking similarity” was merely one road towards something more general may, therefore, be found even in the judgments in *Boardman*.

<sup>283</sup> Note 278, at 287.

itself which supplies its own probity, but *its relevance in the light of all the other evidence*. In the words of Allan:<sup>284</sup>

. . . evidence which *does* merely show criminal disposition may nevertheless have specific probative value in relation to the crime charged *in the light of the other evidence in the case*.

The same point was highlighted by the Court of Appeal in *Brooks*:<sup>285</sup>

. . . it is better for the court simply to enquire what the evidence sets out to prove and whether there are any features of the evidence which makes it probative of that fact in a permissible way. It is not enough for the facts to be similar, *they must be similar in a way which tells the jury something useful*. Whether they will do so depends entirely on the circumstances, but the more commonplace the facts the less likely that the similarities will lead anywhere at all. [emphasis added].

What had seemed like a new ‘clean slate’ in *Boardman* was rapidly written all over in subsequent cases, of which, ten years later,<sup>286</sup> Carter observed:

. . . the flow of reported cases concerning the admissibility of similar fact evidence can scarcely be said to have abated . . . Any attempt to distil a statement of the law from the morass of authority remains a formidable undertaking.<sup>287</sup>

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<sup>284</sup> Note 268, at 255. It was this appreciation of the potential relevance of this type of evidence *to the Crown’s case as a whole* which led to the “no hypothesis consistent with innocence” approach of the Australian High Court in *Pfennig* that same year – see note 564. Allan added (*ibid*) that it was necessary to look at “. . . the context of the whole case, including the nature of the defence”, which was of course a reflection of the rule originally formulated in *Makin*.

<sup>285</sup> (1991) 92 Cr. App. R. 36, in which the Court reviewed all the case-law since *Boardman*, and repeated its warning against the slavish use of phrases such as “positive probity”.

<sup>286</sup> Note 272, at 42.

At the same time, he reminded those with an interest in the topic that the *Boardman* test involved the balancing of “probity” against another ingredient which seemed to have escaped everyone else’s attention.<sup>288</sup>

The judge must be satisfied that the real probative worth of the evidence completely underwrites *any likely prejudice*. The matter is one of degree, but the test must be a stern one. (emphasis added).

When given its first opportunity to restore the balance, and show the way forward, the House of Lords, in *DPP v P*,<sup>289</sup> did no more than repeat the mantra of the Court of Appeal for the previous sixteen years, namely that a “striking similarity” between the facts of a case and the similar fact evidence which it was being sought to adduce was only *one* way in which such evidence might be sufficiently relevant to justify its admission. Lord Mackay L.C. opined that:<sup>290</sup>

Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

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<sup>287</sup> Wigmore (note 264) had been complaining of a “vast morass of authority” three decades *before Boardman*, so it would seem that little had changed. The courts were clearly no nearer to producing a working formula than they had been in the post-*Makin* days.

<sup>288</sup> Note 272, at 43. In *Lewis* (1983) 76 Cr. App. R. 33, for example, the Court of Appeal had completely ignored this aspect of the *Boardman* test, in upholding the admission, during the trial of a man accused of acts of indecency with his stepdaughters, of evidence that the accused possessed literature belonging to the Paedophilic Society, and had admitted to police that he was a paedophile, while denying that he was a child molester. On appeal, it was held to have been sufficient for the trial judge to warn the jury that they were not to regard L’s predilections as evidence of his guilt, although one is tempted to ask what precisely their Lordships thought it was admissible as evidence *of*. Clearly, the prejudicial nature of such evidence far outweighed any probative value it might have possessed, but that aspect of *Boardman* had clearly not travelled well.

<sup>289</sup> [1991] 2 AC 447.

<sup>290</sup> At 460-461.

All that this added to what their Lordships had already laid down in *Boardman* was the superfluous rider that some forms of similar fact evidence will be more obviously admissible than others.

### **The policy swing towards increased admissibility**

While these efforts to define “probity” were occurring, a subtle policy swing towards a greater admission of prior misconduct evidence was under way. It was led by the Court of Appeal, but disguised as another question entirely, namely whether the “probity versus prejudice” test was to be applied by *trial judges* as a prerequisite of admission, or left for determination by *juries*, as the “tribunals of fact”.

This ball was first sent rolling by Scarman LCJ only a year after *Boardman*. In *Rance and Herron*,<sup>291</sup> he observed that:

If the judge is satisfied that the evidence, if accepted by the jury, goes beyond mere evidence of disposition, he should let the evidence in and then leave it to the jury to make what they think of it . . . the judge should . . . tell them that if they think it merely contains evidence of disposition they should not take any notice of it.

Two difficulties are immediately apparent if this approach is adopted. The first is that the correctness of the exercise of a judicial *discretion* is a difficult matter to

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<sup>291</sup> Note 275, at 122. See also *Scarrott*, note 276, at 131. This would make the test for the admission, and use made, of similar fact evidence analogous to that employed in relation to a challenged confession. The trial judge must first determine whether or not, as a matter of law, it is admissible, but it is ultimately a matter for the jury how much “weight” they attach to it, having regard to precisely the same factors which went into an assessment of its admissibility.

assess on appeal. This had been alluded to twice by the Court of Appeal in the space of one month, barely a year after *Boardman*.<sup>292</sup>

The second difficulty is that before safely leaving in the hands of a jury a task which requires them to “ignore the elephant in the room”, the trial judge will be required to direct that jury in the most detailed and authoritative terms regarding the need to avoid “forbidden reasoning”. Once the evidence is admitted, there is always the risk that the jury will employ it for the wrong reason, and no amount of judicial direction can guarantee that this does not occur.

This in turn underlines the need for strong judicial direction to the jury regarding (a) *why* the Crown asserts that the similar fact evidence is relevant to the case against the accused; (b) the fact that it is for the jury to decide for themselves whether or not they agree with the Crown on that point, and (c) that they may not use that evidence for any *other* purpose. This need for additional judicial attention to these matters had been latent in some of their Lordships’ pronouncements in *Boardman*,<sup>293</sup> but like so much else in that case, it was about to be overlooked.

The issue was thrown into sharp focus on the second occasion after *Boardman* when the House of Lords was called upon to reap what it had sown. *DPP v H*<sup>294</sup> involved the all-too familiar scenario of separate victims of alleged sexual offences by the accused (in this case his adopted daughter and his step-daughter) being allowed to cross-corroborate each other on the trial of a “joined” indictment, in circumstances in

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<sup>292</sup> In *Mustafa* (note 274, at 30), it had pointed out that “It is for the judge in the exercise of his discretion to balance probative value and prejudicial effect. Unless one can show in an appellate court that that discretion has been wrongly exercised or has been exercised upon a mistaken view of the law, this Court will not interfere with the discretion of the trial judge.” See also *Novac and Ors* (note 274), at 115.

<sup>293</sup> Note 235, per Lord Hailsham at 453 and Lord Cross at 459.

<sup>294</sup> [1995] 2 AC 596; [1995] 2 WLR 737.

which it was being alleged that the girls had either deliberately colluded with, or been unconsciously influenced by, each other.

The trial judge had allowed the jury to decide for themselves whether or not the evidence of the two girls had been contaminated in this way, and on appeal it was argued for the defence, in essence, that proof of the *truth* of the similar fact allegations was a pre-requisite to their admissibility. In rejecting this approach, and dismissing the appeal, Lord Mackay, L.C. ruled that:<sup>295</sup>

Where there is an application to exclude evidence on the ground that it does not qualify as similar fact evidence and the submission raises a question of collusion . . . the judge should approach the question of admissibility on the basis that the similar facts alleged are true.

Lord Griffiths expressed the same view in language more directly reflecting the traditional roles of judge and jury, thus:<sup>296</sup>

Deciding the facts requires the jury in all cases to decide whose evidence they find credible and what inferences they are prepared to draw from the facts as they find them. I would therefore resist any attempt to remove this essential role from the jury for to do so seems to me to strike root and branch at the very reason we have jury trial . . .

Lord Mustill, while conceding the risk which such an arrangement might entail, nevertheless went along with the remainder of the House,<sup>297</sup> on the pragmatic ground that “. . . I would not be willing to impose a practice which would in many cases make the just prosecution of these offences impossible.”

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<sup>295</sup> At 612.

<sup>296</sup> At 613. Lords Lloyd and Nicholls issued judgments containing similar sentiments.

<sup>297</sup> At 617.



His Lordship seems to have been primarily concerned that the need for a trial judge to hold a *voir dire* in order to test the possibility of collusion would require the victim to undergo further cross-examination, which would be “. . . more than I am willing to accept”.<sup>298</sup> But, with respect, if one of the essential tests of the “probity” of an item of evidence is its “cogency”,<sup>299</sup> then any trial judge, required in terms of *Boardman* to balance “probity” against “prejudice”, must make due inquiry into the possibility of falsehood through contamination.

Put another way,

. . . since probative value is an essential part of the admissibility test and since credibility of the evidence in question might be thought an element thereof, the test does naturally entail a preparedness to take the possibility of contamination into account.<sup>300</sup>

Even Lord Lloyd, while concurring with the rulings of his brethren in the instant case, seemed to advocate the need for more vigilance by the trial judge in certain cases, because:<sup>301</sup>

. . . where a risk of collusion or contamination is apparent on the face of the documents, it will always be an element, and exceptionally a decisive element, in deciding whether the probative force of the similar fact evidence is sufficiently strong to justify admitting the evidence, notwithstanding its prejudicial effect.

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<sup>298</sup> *Ibid.*

<sup>299</sup> *Cross on Evidence* (7<sup>th</sup> ed, 1990), at p.352.

<sup>300</sup> Mirfield, ‘Proof and Prejudice in the House of Lords’, (1996) 112 Law Quarterly Rev. 1, at 4.

<sup>301</sup> At 626.

Again with respect, the need for a high degree of probity is surely at its greatest when the risk of “moral prejudice”, as it is usually called,<sup>302</sup> against the accused is at its highest, as it is in cases such as *DPP v H*, and it is in such cases that the accused is in the greatest need of judicial protection. It is bad enough that the evidence is prejudicial; if it is also *untrue*, then clearly the trial will be unfair. It was for this reason, among others, that the approach adopted by the House of Lords in this case was soundly rejected by both the High Court of Australia,<sup>303</sup> and the Supreme Court of Canada.<sup>304</sup>

Roberts,<sup>305</sup> in summarising the combined consequences of *DPP v P* and *DPP v H*, said of them that:

In *DPP v P*, and then in *H*, the senior judiciary has reversed the tide of a century’s jurisprudence on the admissibility of . . . similar fact evidence and turned its back on those concerns about the unreliability of evidence that may have been contaminated by collusion or confabulation which so exercised Lords Cross and Wilberforce in *DPP v Boardman* only twenty years before. (footnotes omitted).

The clear implication that, whenever possible, bad character evidence ought to be admitted, and then left to the jury to assess for its relevance (regardless of their lack of legal training to avoid any “forbidden” reasoning) was further underlined in the next case to come before the House of Lords. In *R v Z*,<sup>306</sup> the Crown appealed a decision by a trial judge not to admit certain evidence against a man accused of rape who was pleading “consent”. The evidence in question concerned four previous occasions on

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<sup>302</sup> That is, prejudice based solely on the jury’s feelings of revulsion following the exposure of the accused’s tendencies; see note 337.

<sup>303</sup> In *Hoch v The Queen* (1988) 165 CLR 292.

<sup>304</sup> In *Handy* [2002] 2 S.C.R. 908. In this latter case, it was observed, at para. 110, that “. . . the existence of collusion rebuts the premise on which admissibility depends”. However, in *Christou*, [1997] AC 117, the House of Lords again declined an opportunity to adopt this more logical approach in cases of alleged contamination of testimony.

<sup>305</sup> ‘All the Usual Suspects; A Critical Appraisal of Law Commission Consultation Paper 141’, [1997] Crim L R 75, at 78.

<sup>306</sup> [2000] 2 AC 483.

which he had been tried for rape, on three of which he had been acquitted. In every case, Z had pleaded consent, and the Crown had sought to call, as witnesses against Z in the instant case, the complainants from the previous cases. It was not disputed that their testimony would reveal “a considerable number of similarities in the conduct of the defendant alleged by [the new victim] and the other four complainants”.<sup>307</sup>

The defence argument was to the effect that, since Z had been acquitted of three of the previous charges, to allow these previous complainants to testify against him again would be a breach of the “double jeopardy” rule, in that it would tend to show Z to be guilty of offences to which a formal plea in bar of trial of “autrefois acquit” should apply.<sup>308</sup>

The House drew an important distinction between “res judicata” estoppel, which relates to the *entire cause of action* between an accused and the Crown, and “issue estoppel”, which relates to only *one issue of fact between them*. Only the former, they ruled, was caught by the “double jeopardy” rule, whereas in relation to specific issue of fact between the Crown and an accused

. . . the defendant is not placed in double jeopardy because the facts giving rise to the present prosecution are different to the facts which gave rise to the earlier prosecution. The evidence of the earlier complainants is . . . not inadmissible because it shows that the defendant was, in fact, guilty of the offences of rape of which he had earlier been acquitted . . . subject . . . to the discretion of the judge to exclude the evidence after

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<sup>307</sup> Per Lord Hutton, at 488.

<sup>308</sup> The defence team, and the trial judge, based their arguments on the Privy Council ruling in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 at 479, that “ . . . the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication”.

weighing its prejudicial effect against its probative force or under section 78 of the Police and Criminal Evidence Act 1984.<sup>309</sup>

His Lordship further explained the logical basis for his ruling as being that:<sup>310</sup>

It would be a denial of the principle upon which similar fact evidence is admitted that such evidence should be treated as inadmissible.

The Court justified its position by reference to the alternative which, it was held,<sup>311</sup> might involve:

. . . . the unedifying spectacle . . . . of a succession of acquittals based on individual allegations which, viewed in isolation, left room for doubt, but which, when viewed as part of a pattern, each drawing support from the others, might lead irresistibly to a conclusion of guilt.

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<sup>309</sup> Per Lord Hutton, at 506, with whom the remaining Lords concurred. Section 78 was the statutory embodiment of the *Christie* principle, while the ‘probity versus prejudice’ test was the common law one which had emerged in *Boardman*.

<sup>310</sup> At 508-9. One is, however, prompted to speculate on what precisely his Lordship believed the evidence of the prior incidents was “relevant” to. It is difficult to appreciate how the state of mind (re. consent) of four independent women on four separate occasions in the past might be relevant to the state of mind of the accused on a fifth occasion; see *Phillips* (note 653). However, the same distinction had been drawn between “cause of action” and “issue” estoppel by the Australian High Court in *Rogers v The Queen* (1994) 181 CLR 251. *R v Z* also found judicial support in New Zealand, where it was adopted by that country’s Court of Appeal in *R v Degnan* [2001] NZLR 280 (C.A.). The United States Supreme Court also adopted a comparable stance in *Dowling v United States* (1990) 110 S. Ct. 668.

<sup>311</sup> At [33]. There was also some authoritative academic opinion in support of this approach. The Canadian scholar Stuesser (“Admitting Acquittals as Similar Fact Evidence”, (2002) 45 Criminal Law Quarterly, 488, at 498), commenting not only on the ruling in *R v Z*, but also a line of decisions by the Canadian courts, made the telling observation that if Smith (note 180) had been tried separately for each of his wives’ deaths, without reference to either of the other two, then he might well have been acquitted of all three, because none of the juries would have been allowed to be advised of what might be termed “the full picture”. With respect, the court in that case was concerned with the state of mind of the *accused*, not the victims.

Stuesser, in addition,<sup>312</sup> argued that if this application of issue estoppel were to be allowed to prevail in such cases, then :

We are back to playing games with similar fact evidence. We are back to admitting such evidence given its purpose but not its probative value. We are back to pigeon-holing the similar fact evidence.

This was essentially an argument in favour of approaching similar fact evidence from the standpoint of its *relevance* rather than the category into which it might be fitted. In this regard, Stuesser found support from a leading English academic, Roberts,<sup>313</sup> who confirmed that “. . . the probative value of extraneous misconduct evidence is not affected by a prior acquittal.”

But there were also academic opinions to the contrary. Tapper,<sup>314</sup> after reminding his readers of the House’s prior ruling in *DPP v H*,<sup>315</sup> to the effect that evidence admitted under the similar fact rule should be presumed to be true, observed that:

There might be thought to be some incompatibility between presuming persons guilty after, and despite, their acquittal according to law, and presuming them to be innocent until they have been proved guilty according to law. . . .

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<sup>312</sup> *Ibid.*

<sup>313</sup> ‘Acquitted Misconduct Evidence and Double Jeopardy’, [2000] Crim L R 952, at 958. See also Munday, ‘Admitting Acquittals as Similar Fact Evidence of Guilt’, [2000] Cambridge Law Journal, 468, at 470, who opined that “. . . to admit acquittals as similar fact evidence provided that they possess sufficient probative value accords with instinctive common sense”. See also Birch, [2001] Crim L R 222, at 224.

<sup>314</sup> ‘Clouded Acquittal’, (2001) 117 Law Quarterly Rev. 1, at 3.

<sup>315</sup> Note 294.

Similarly,<sup>316</sup> Mahoney insisted that:

. . . a guilty verdict by the current jury that relies even in part on the similar fact evidence of the earlier offence necessarily means that the current jury had no ultimate doubt about the accused's guilt of that earlier offence.

Tapper observed,<sup>317</sup> of *R v Z*, that “It remains to be seen what inspired so radical a change.” In fact, the decision in *Z* proved to be the first warning of an impending policy change in English law, born of a growing belief that laws such as those which restricted the admission of similar fact evidence were operating too favourably towards an accused. There was also a growing insistence by qualified commentators that “Truth is our ultimate goal in a criminal trial”,<sup>318</sup> which was to be cynically employed by those with a policy agenda to “get tough on criminals”.

This policy was soon to be expressed in statutory form. In the meantime, from a common law standpoint, what had been described only twenty years earlier, as “an intellectual breakthrough” had not lived up to its promise.

### **An avalanche of paper**

The growing belief that the legal pendulum in England was swinging against the criminal accused was confirmed in a series of Government-sponsored papers in which calls for the “simplification”, “clarification” and “reassessment” of the law on similar fact evidence proved to be camouflage for a new policy initiative to “get

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<sup>316</sup> “Acquittals as Similar Fact Evidence: Another View”, (2003) 47 Criminal Law Quarterly 265, at 270-1. See also Mirfield, P, “Res Judicata Rejected”, (2001) 117 Law Quarterly Rev. 194.

<sup>317</sup> Note 314, at 4.

<sup>318</sup> Per Stuesser, note 311, at 490.

tough on criminals”. It was also cunningly disguised as a campaign to ensure that a court received as much “evidence” as was available to it. This series of papers culminated in the *Criminal Evidence Act 2003* (E&W), which re-established a ‘categories of admissibility’ regime which generated far more confusion and uncertainty than either *Makin* or *Boardman*.

These papers, in chronological order, were:

1. The Eleventh Report of the Criminal Law Revision Committee (1972).<sup>319</sup>
2. Law Commission Consultation Paper (1996).<sup>320</sup>
- 3/4 “Criminal Justice – The Way Ahead” (2001),<sup>321</sup> and “Justice for All” (2002).<sup>322</sup>
5. The Auld Review (2001).<sup>323</sup>
- 6/7. Law Commission Final Report (2001),<sup>324</sup> and *Criminal Justice Act 2003* (E & W)

*The 11<sup>th</sup> Report of the Criminal Law Revision Committee*

In its Eleventh Report to the UK Parliament, issued three years before *Boardman*, the Criminal Law Revision Committee (“CLRC”) had taken,<sup>325</sup> as its starting point:

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<sup>319</sup> CLRC 11th Report – “Evidence (General)” (1972) (Cmnd. 4991).

<sup>320</sup> “Evidence in Criminal Proceedings: Previous Misconduct of a Defendant” (Law Commission Consultation Paper no. 141, 1996).

<sup>321</sup> CM 5074.

<sup>322</sup> CM 5563.

<sup>323</sup> “Review of the Criminal Courts of England and Wales” (HMSO, October, 2001).

<sup>324</sup> “Evidence of Bad Character in Criminal Proceedings” (Cm. 5257).

. . . the ideal that all available and relevant evidence should be before the court. We have throughout aimed at reducing the exceptions to admissibility under the present law. . . . There has . . . been a good deal of feeling in the committee and elsewhere that the law of evidence should now be less tender to criminals generally.

Ominously, it added that:<sup>326</sup>

. . . there seems to be an idea that the defence have a sacred right to the benefit of anything in the law which may give them a chance of acquittal, even on a technicality, however strong the case is against them. We disagree entirely with this idea.

Given these caveats, it was probably too optimistic to expect any workable proposals for reform, and indeed there were none. The Committee's principal proposal to "codify the main part of the rule",<sup>327</sup> on the admission of similar fact evidence, found its way into Clause 3 of its Draft Bill, which reproduced the first 'arm' of the original *Makin* Rule, to the effect that evidence of "other conduct" by an accused should not be admissible solely to prove their "disposition", then stipulated three purposes for which such evidence *might* be admissible. They were, essentially, to prove (a) *modus operandi*, (b) similarity of chosen victim, and (c) identification by a Crown witness. This clearly would have taken the common law back to where it was before *Boardman*, and arguably even before *Makin*.

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<sup>325</sup> Note 319, paras. 20 & 21.

<sup>326</sup> *Ibid*, at para.27. However, in para. 22, it conceded that "We differ greatly among ourselves as to the extent of the danger that juries may be unduly affected by knowledge of other misconduct of the accused and . . . as to how far it is right to go in allowing this conduct to be disclosed."

<sup>327</sup> Para. 78.



The most controversial proposal contained within the Report was the suggestion that the rule thereby enacted should be relaxed in cases in which the accused admits the act which is the basis of the charge for which they are on trial, but still maintains a “Not Guilty” plea to that charge (e.g. the alleged rapist who admits intercourse but claims that the alleged victim consented). In such cases, it was proposed that the accused’s “disposition” to commit offences should be admissible in those circumstances in which case-law had held it to be admissible under the second limb of *Makin* (e.g. to prove ‘state of mind’ or ‘absence of accident’), with the important difference that it would no longer be necessary for the Crown to demonstrate any factual similarity between the previous offence and the offence charged.<sup>328</sup> This revealed a total ignorance of the fact that *relevance is the key to admissibility, and factual similarity is one form of relevance*.

It also ran contrary to what the House in *Boardman* would shortly decide should be the law. It was also open to serious criticism, in that it appeared to proceed from a questionable *policy* which sought to ‘jail more criminals’,<sup>329</sup> rather than any legal *principle* based on logic and relevance. From its outset, the legal justification for the admission of similar fact evidence had always been its “logical probity” to the facts of the instant case, and the principal reason for its *exclusion* had been the risk that the offender would be convicted for the wrong reason. This safeguard was now being depicted as a “technicality” which stood in the way of a higher conviction rate. Clause 3 was also open to the objection that it perpetuated the ‘categories of admissibility’ approach to “disposition” evidence generally which had generated so much confusing and inconsistent case-law since *Makin*.

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<sup>328</sup> By way of example, it was suggested (in para. 92) that “. . . if the accused is charged with obtaining property by deception and admits that he made the statement and that it was false, evidence of any previous offence of obtaining property by deception will be admissible, on the issue of dishonesty, even if the circumstances were quite different”.

<sup>329</sup> In para. 93, the Committee added that “. . . all agree that, if the defence agree that the conduct took place, then the probative value of the other offences justifies making them admissible in evidence notwithstanding their possibly prejudicial effect.”

The implied assertion that the probative value of similar fact evidence is in some way enhanced, and its prejudicial effect somehow reduced, by the fact that the accused admits the *actus reus*, flies in the face of both logic and the rationale for admitting such evidence. If one factor had emerged clearly from the case-law to that point, it was surely that what gives some similar fact evidence its probity is the “striking similarity” between the facts and circumstances of the previous misbehaviour and the alleged actions of the accused in the instant case. It is therefore counter-intuitive to deny a jury access to those previous facts in *any* context.<sup>330</sup>

Professor Cross, himself a member of the CLRC, observed, shortly after the publication of its Report,<sup>331</sup> that “I have a sneaking feeling that cl.3 of the Draft Criminal Evidence Bill is the least likely of all the clauses ever to become law”. In fact, it never did become law, and the task of replacing a besieged legal principle with a new statutory policy was handed to the Law Commission.

*Law Commission Consultation Paper, 1996*

The Law Commission’s Consultation Paper of 1996 began with a reference to the CLRC Report,<sup>332</sup> and, first,<sup>333</sup> endorsed the CLRC’s earlier observation,<sup>334</sup> regarding the law relating to the admission of similar fact evidence, namely that it was:

. . . . difficult to summarise because it is exceptionally complicated and because opinions differ greatly as to the effect of some of the decisions and as to whether the law is entirely consistent in itself.

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<sup>330</sup> This much was actually conceded by the Committee, when they observed (in para. 96) that “. . . . a bare conviction does not reveal the facts of the offence sufficiently to indicate whether the disposition which caused the accused to commit it is of particular relevance for the proof of the offence charged”.

<sup>331</sup> “Clause 3 of the Draft Criminal Evidence Bill, Research and Codification”, [1973] Crim L R 400.

<sup>332</sup> Note 319.

<sup>333</sup> In para.1.2.

<sup>334</sup> Note 319, para.78. The Commission clearly did not consider that this state of affairs had improved following *Boardman*.

The Commission, first of all,<sup>335</sup> distinguished between what it termed “reasoning prejudice”,<sup>336</sup> and “moral prejudice”,<sup>337</sup> and concluded that:<sup>338</sup>

It is only where there is a risk of prejudice that the evidence needs to be subject to an exclusionary rule;<sup>339</sup>

The Commission took,<sup>340</sup> as its guiding principle, that:

. . . the admissibility of bad character evidence in chief should depend upon the probative value of the evidence, and not on the purpose for which it is proposed to adduce it; and that the evidence should not, therefore, be inadmissible merely because it is relevant only to propensity, provided that it is sufficiently probative.

The final test recommended by the Commission for the admissibility of similar fact evidence in chief appeared in para.10.74 of the Paper, and was that such evidence should be admissible if:

- (1) it is relevant to a specific fact in issue; and

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<sup>335</sup> In paras.7.7 – 7.15.

<sup>336</sup> This it defined as the danger that “ . . . the jury or magistrates may assess the evidence wrongly, giving too much weight to the disposition evidence”; see para. 7.7.

<sup>337</sup> This is the risk that “the jury or magistrates may reach a verdict based on the accused’s character, rather than on the evidence”; see para.7.10.

<sup>338</sup> In para.9.86.

<sup>339</sup> With respect, surely it is the other way around, in that an exclusionary rule is required in order to prevent possible prejudice.

<sup>340</sup> The Commission was obviously satisfied that the similar fact evidence had been rightly admitted in *Ball and Ball* (note 173), *Thompson* (note 192) and *Straffen* (note 226), even though, in each case, it was evidence relating to the accused’s “propensity” to behave in a certain way. See paras.10.9 and 10.10. It also clearly favoured the *Boardman* approach over what it perceived to have been the original ratio of *Makin*

- (2)
- (3) on the assumption that the evidence is true, the *degree* to which it is relevant to that fact (in other words, its probative value) outweighs the risk that, if admitted, it might
  - (a) result in prejudice;
  - (b) mislead, confuse or distract the fact-finders; or
  - (c) cause undue waste of time.

There were several obvious difficulties with such a suggested statutory formula, offered at that time. The first was that, although in *form* it appeared to replicate the ‘probity versus prejudice’ test of *Boardman*, in *substance* it took the test no further than it had been stated more succinctly in *Boardman*, and therefore did nothing to resolve the unworkability of the test in practice which had become apparent in the case-law subsequent to *Boardman*.<sup>341</sup> Also, like that subsequent case-law, it failed to define either “probative value” or “prejudice” in any practical sense.

Another difficulty was the requirement that one *assume* the truth of the similar fact evidence which was being considered for admissibility. There is, in admitting several *unproved* allegations of a “strikingly similar” nature against an accused who is on trial in respect of only one of them, the risk that, by sheer weight of numbers, or by mere repetition, each acquires a seemingly enhanced credibility, whether or not all or any of them are false. As the Canadian Supreme Court was to observe in *Handy*,<sup>342</sup> the whole logic of admitting similar fact evidence depends upon that evidence being true.

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<sup>341</sup> As one commentator (McEwan, “Law Commission Dodges the Nettles in Consultation Paper No. 141”, [1997] Crim L R 93, at 94) subsequently observed, “It is not clear why it is thought that placing what amounts to the common law into a statute is going to make any difference to judicial decisions. The application of such a clause would depend upon the subjectivity of the court’s perception of probative value, and that is the root cause of the present levels of unpredictability in the similar facts case law”.

<sup>342</sup> Note 304.

Despite these dangers, the House of Lords in *DPP v H*,<sup>343</sup> had held that, in admitting such evidence, the trial judge must *assume* its truth, and leave it to the jury to assess its veracity as part of the normal jury function. The Commission was prepared to rely on the authority of *H* for its generalised conclusion that it:<sup>344</sup>

. . . . . would be very unhappy about adopting a procedure by which the role of the fact-finders moved from jury to judge.

This approach would also seem to be inconsistent with the very rationale for excluding some similar fact evidence, namely the risk that the “fact-finders” might be unduly prejudiced by it. Once they have heard it, it would take a very strong direction indeed from the trial judge to persuade them to put it from their minds once it *has* been shown to be unreliable.<sup>345</sup>

The academic response to the Paper was mixed. For example, Roberts, the following year,<sup>346</sup> complained of what appeared to him to be:

. . . . a populist programme of criminal justice reform predicated on the notion that the criminal process now too greatly favours defendants at the expense of law-abiding folk.

On the other hand, Professor Tapper, a few years later,<sup>347</sup> said of it that:

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<sup>343</sup> Note 294.

<sup>344</sup> Para.10.97

<sup>345</sup> “A bell once rung cannot be unring” (Leonard, *The New Wigmore. A Treatise on Evidence: Evidence of Other Misconduct and Similar Events*, (2011 Aspen Publishers, USA).

<sup>346</sup> Note 305, at 79.

<sup>347</sup> In [2004] Crim L R 533, at 537.

A singular strength of this paper was the robust clarity of the principles it recommended to govern this area of the law: that it should be simplified so far as possible; that all relevant evidence should be admissible unless there is a good reason for its exclusion; and that no evidence should be admitted if no effective warning as to weight, or coherent instruction as to its use, can be given.

However, in the event the Paper had no immediate practical outcome, and:<sup>348</sup>

We were condemned to a future of endless tinkering with the rules of evidence rather than a comprehensive overhaul. But overhaul is what is needed.

That “overhaul” lay another six years in the future, and yet again failed to deliver the simple formula for admissibility which was so clearly required.

*“Criminal Justice: The Way Ahead”/ “Justice for All” (2001-2)*

The suspicion that a widely-swung legislative axe was about to be taken to some fundamental and time-honoured principles which were getting in the way of convictions was deepened by some of the phrases employed in two Government-sponsored papers delivered in 2001 and 2002. The Introduction to the 2001 Paper, which appeared to be largely politically inspired,<sup>349</sup> contained the following:

Nothing does more damage to people’s confidence in the [criminal justice system] than a perception that criminals are getting away with their crimes . . . . we aim to . . . close the ‘justice gap’ and bring more criminals to justice. . . . One option for

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<sup>348</sup> Darbyshire, note 44, at 105.

<sup>349</sup> Note 321. This was published in February 2001, and the quotations are taken from paras. 2, 14, 17, and 28 of the Introduction to it.

simplification would be to allow evidence of previous convictions where relevant, providing their prejudicial effect does not outweigh their probative value.

One could be forgiven for believing that this is what had already been laid down in *Boardman*. However, this time what was being promised were:<sup>350</sup>

. . . simpler, fairer rules of evidence, so that magistrates and juries may have access to all the relevant and reliable material they need to acquit the innocent and convict the guilty.

This generalised bundle of pious promises was followed, in July 2002, by another Government White Paper, “*Justice for All*”,<sup>351</sup> which was even blunter in its message that:<sup>352</sup>

Too few criminals are caught or convicted . . . This White Paper is designed to send the strongest possible message to those who commit crimes that the system will be effective in . . . convicting them.

Once again, the Government pledged to:<sup>353</sup>

. . . overhaul the rules of evidence to ensure the widest possible range of relevant material is available for a judgment. This includes making information available to judges and juries on previous convictions and misconduct where it is relevant and put in context.

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<sup>350</sup> On p.11.

<sup>351</sup> Note 322.

<sup>352</sup> The quotation comes from the third paragraph of the “Foreword” section of the Paper.

<sup>353</sup> On p.68 of the Paper.

In relation to similar fact evidence it foreshadowed that:<sup>354</sup>

. . . where a defendant's previous convictions, or other misconduct, are relevant to an issue in the case, then unless the court considers that the information will have a disproportional effect, they should be allowed to know about it. It will be for the judge to decide whether the probative value of introducing this information is outweighed by its prejudicial effect.<sup>355</sup> These safeguards will be set out in legislation. This will reform the current haphazard collection of exclusionary rules.

In the event, this "haphazard collection of exclusionary rules" was to be replaced by a haphazard collection of *inclusionary* rules.

*The Law Commission's Final Report/ The Criminal Justice Act 2003 (E & W)*

Following the feedback it had received on its 1996 Consultation Paper,<sup>356</sup> the Law Commission presented its final Report in October 2001, together with a draft Bill intended to reflect its recommendations in statutory form. The legislation which eventually emerged from the Report, following vigorous, and at times heated, Parliamentary debate,<sup>357</sup> was the *Criminal Justice Act 2003* (E & W), most of which

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<sup>354</sup> In para. 4.57.

<sup>355</sup> It will be noted that the Government of the day was impliedly taking the credit for the decision in *Boardman*, which itself was by now a quarter of a century in the past, and had proved unworkable in the hands of judges who could not effectively identify what constituted either "probative value" or "prejudicial effect". Lord Justice Auld, in his "Review of the Criminal Courts of England and Wales", published the previous year (see note 323) had already (one assumes unwittingly) drawn attention (in para. 116) to what had followed the *Boardman* "test of balancing proof against prejudice", namely the eventuation of the risk that "the imprecision of the exercise applied on a case by case basis might in the early days substitute uncertainty for complexity, only to succumb again to complexity as it became overlain with case law."

<sup>356</sup> Note 320.

<sup>357</sup> One example of this will suffice. On 12 December 2004, during the House of Lords debate on the associated *Criminal Justice Act 2003 (Categories of Offences) Order 2004* (reported in Hansard HL, vol.667, cols 1260-1), Lord Thomas of Gresford QC likened what was being introduced to the draconian legislation forced through by Robespierre during the Reign of Terror in post-Revolutionary France. Interestingly, during the same speech, he illustrated the extent of what he regarded as the Government's



came into force on 15 December, 2004. Part 11, Chap.1 (sections 98-113) of that Act deals with “bad character” evidence generally.

### Re-defining “bad character” evidence

Fundamental to the entire philosophy and structure of both the Report and the Act was a new definition of what precisely constituted “bad character” evidence. Para.3 of the Summary of the Report advocated :

. . .the idea that, in any given trial, there is a *central set of facts* about which any party should be free to adduce relevant evidence without constraint – even evidence of bad character. Evidence falls within this central set of facts if it has to do with the offence charged, or is evidence of misconduct connected with the investigation or prosecution of that offence.<sup>358</sup> We recommend that evidence of bad character which falls outside this category should only be admissible if the court gives leave for it to be adduced, or all parties agree to its admission, or it is evidence of a defendant’s bad character and it is that defendant who wishes to adduce it.

This purported new concept appeared, at long last, to acknowledge the fundamental and crucial test for the admissibility of *all* similar fact evidence, namely *its relevance to the facts of the instant case*. Unfortunately, not only did it fail to equally acknowledge that some bad character evidence can be more prejudicial than probative, but it also proposed that *however prejudicial it might be*, it was to be automatically admissible, without any judicial restraint, if it fell within either of the categories of (a) being “to do with the offence” on trial, or (b) “misconduct to do with the investigation

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exaggeration of the urgent need for reform of the criminal trial process by quoting the Home Office’s own 2003\4 statistics, which revealed that of over 5 million reported crimes, acquittal by jury did not exceed 9,000 outcomes.

<sup>358</sup> This was included so as to allow a defendant to make allegations against the police (e.g. of an “involuntary” confession) or a prosecution witness (e.g. an allegation of false testimony by an alleged victim proceeding from improper bias) without the loss of any “shield” provided by the law against the “tit for tat” adduction of the defendant’s own bad character, which had hitherto been possible under s 1 (f)(ii) of the *Criminal Evidence Act, 1898* (E & W).

or prosecution of that offence”. Furthermore, if it did, *it was not even to be regarded as “bad character evidence”*.

This new principle was embodied in s 98 of the Act, which unfortunately failed to indicate what behaviour by an accused might be said to “have to do with” the facts of the instant case. Clearly within the definition would be other criminal acts performed as part of the *actus reus* of the main offence on trial,<sup>359</sup> or reprehensible behaviour which is part of the events leading up to the main offence,<sup>360</sup> or without which the final criminal act cannot be fully understood in its context.<sup>361</sup>

As it transpired – and might perhaps have been predicted – there was considerable potential for overlap between bad character evidence which might be said to “have to do with” the facts of the instant case, and therefore be admissible without judicial leave under s 98, but which might also be said to fall within one of the “gateway” categories under which bad character evidence might be admitted only *with* leave.<sup>362</sup> It was not long before the Court of Appeal began hedging its bets,<sup>363</sup> by ruling that even if it was wrong in holding that the evidence fell within the provisions of s 98, then at least it was clearly admissible through one of the ‘gateways’ set out in section 101. The difference between the two, which such an approach clearly overlooks, is that in the latter case, the Crown would need to have justified the admission of the evidence to the trial judge.

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<sup>359</sup> An example of such a scenario might be what under Queensland law would be called a “deprivation of liberty” as part of a subsequent rape.

<sup>360</sup> As in *Brummitt* [2006] EWCA Crim 1629, in which a thief racing from a crime scene caused a fatal road accident. In *Saleem* [2007] EWCA Crim 1923, the Court of Appeal suggested, as an example, a “revenge” assault on a person who had earlier reported the accused for wife-beating.

<sup>361</sup> As in the Australian case of *O’Leary* (1947) 73 CLR 566, in which the previous behaviour was regarded as *res gestae* of the incident on trial.

<sup>362</sup> These appear in s 101 – see below.

<sup>363</sup> Professor Spencer (*Evidence of Bad Character*, 2<sup>nd</sup> ed. Hart Publishing, Oxford, 2009) at p.39 described this process as “. . . a series of ‘belt and braces’ decisions”,

One such “belt and braces” case was *Malone*,<sup>364</sup> in which M’s defence to a charge of murdering his wife was that she had simply run away somewhere, which was her habit. Evidence was admitted of a purported report from a private investigator apparently confirming this habit, which M had forged prior to her disappearance. This was held to have satisfied the tests either under s 98,<sup>365</sup> or under s 101(c).<sup>366</sup>

The opportunity was also taken to expand the potential scope of “bad character”. Section 98 defines it as “misconduct, or a disposition towards misconduct”, by an accused. The extended definition of “misconduct” supplied under s 112 of the Act includes not only “the commission of an offence”,<sup>367</sup> but also “other reprehensible behaviour”. There is not even a requirement that the previous misconduct in question be sufficiently probative to secure a conviction if it were to go to trial.

Hardly surprisingly, several commentators expressed uncertainty regarding what, in future, might be taken to constitute “reprehensible behaviour”, and the even more vaguely expressed “evidence of a disposition towards” such behaviour.<sup>368</sup>

The judicial debate which these widely drafted concepts generated is well illustrated by the issues raised before the Court of Appeal in *Manister*.<sup>369</sup> During the

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<sup>364</sup> [2006] EWCA Crim 1860. For a case in which the evidence failed the s 98 test, but was admitted under the “important matter” gateway of s 101(1)(d), see *Timaveanu* [2007] 1 W.L.R. 3049. Other “belt and braces” cases were *Lewis* [2008] EWCA Crim 424 and *McKintosh* [2006] EWCA Crim 193.

<sup>365</sup> It clearly “had to do with the case”, in that it suggested premeditation. The Court categorised this act as “reprehensible behavior”, thus confirming its admissibility without leave under s 98.

<sup>366</sup> It had “substantial value” in “understanding the case as a whole”; see below.

<sup>367</sup> Even, presumably, one of which the defendant has previously been acquitted (as in *Z* – see note 306), or in respect of which they have not yet stood trial (as in *Boardman* and *Smith*).

<sup>368</sup> See, e.g. Munday, ‘What Constitutes “Other Reprehensible Behaviour” under the Bad Character Provisions of the Criminal Justice Act 2003?’, [2005] Crim L R 24, who complained that “. . . the word “reprehensible” is . . . more evocative of Victorian social moralising than representative of the more neutral traits of a statute designed to set the creaking rules of criminal evidence on a modern footing.”. See also Spencer, note 363, at pp. 34-36, who cited twelve Court of Appeal cases in the first three years of the Act’s operation in which these concepts were considered.

trial of M, aged 39, for sexual offences involving a 13 year old girl, evidence was led by the Crown of non-criminal behaviour by M in the past involving girls of 15 and 16, when M had been 34. Having ruled that the prior behaviour of M could not be properly categorised as “reprehensible”,<sup>370</sup> and therefore did not fall within the “bad character” definition of s 98, the Court added that it was nevertheless:<sup>371</sup>

. . . . admissible at common law, in the particular circumstances of this case, because it was relevant to the issue of whether the appellant had a sexual interest in . . . . early or mid-teen girls, much younger than the appellant, and therefore bore on the truth of his case of a purely supportive, asexual interest in [the victim]. It was not in our judgment unfair to admit the evidence.<sup>372</sup>

Commenting on this curious decision, Waterman and Dempster made the telling observation that:<sup>373</sup>

If [the evidence] was sufficiently relevant to that issue [i.e. of whether or not M had a sexual interest in the victim named in the indictment] to be probative, it is submitted that it is difficult to see how it could fail to have qualified as reprehensible behavior.

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<sup>369</sup> Manister was one of the appellants in *Weir and Ors* [2006] 1 Cr. App. R. 19, in which the Court of Appeal also made the general observation (at 333) that “. . . . once it is decided that [the evidence does] not amount to ‘evidence of bad character’, the abolition of the common law rules governing the admissibility of ‘evidence of bad character’ by section 99(1) [does] not apply.”

<sup>370</sup> This was clearly a subjective opinion with which many people might disagree, further demonstrating the uncertainty which had been created in this area of the law. The Court in fact categorised M’s behaviour as “unattractive”. In *Renda and Ors* [2006] 2 Cr. App. R. 24, at 390, the Court of Appeal observed that “. . . . as a matter of ordinary language, the word ‘reprehensible’ carries with it some element of culpability and blameworthiness.”

<sup>371</sup> *Ibid* .

<sup>372</sup> Despite the abolition of the common law rules relating to the admission of bad character, under s 99 of the Act, there had been no abolition of the “unfairness” discretion given to trial judges under s 78 of the *Police and Criminal Evidence Act 1984* (E & W) (“PACE”). This was further confirmed in *Smith*, part of *Edwards and Rowlands and Ors*. [2006] 2 Cr. App. R. 4, 84.

<sup>373</sup> ‘Bad Character: Feeling Our Way One Year On’, [2006] Crim L R 614, at 617.

To this one may add the obvious question of why, given its prejudicial nature, it was not caught by the common law rule under *Boardman*, if, as the Court observed, the abolition of the common law rules did not affect evidence which fell outside the “bad character” definition of s 98. It was clearly not regarded as prejudicial to M, but it *was* regarded as sufficiently relevant to allow the jury to consider it when assessing whether or not he was guilty of inappropriate behavior with an under-age girl. It is submitted that had the *Boardman* test been applied, the evidence would have been excluded.

### **Opening up the flood gate(way)s**

In its 2001 Report,<sup>374</sup> the Law Commission had recommended that bad character evidence relating to an accused which did not form part of “the central facts of the case” ought to be admissible only in certain defined circumstances in which it could be justified, and even then only with judicial leave. These certain defined circumstances ultimately became the “gateways” to admissibility listed in s 101 of the Act. However, s 101 differed materially from the 2001 Report proposals in that (a) there was one *more*, somewhat controversial, gateway, and (b) there was no requirement for judicial leave to be sought, over and above the need for Crown Counsel to demonstrate that the evidence in question qualified to pass through one or more of the “gateways” created.<sup>375</sup>

The gateways specified in s 101 may be summarised as encompassing circumstances in which:

- (a) all parties to the proceedings agree to the evidence being admissible;

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<sup>374</sup> Note 321, Parts IX to XIV.

<sup>375</sup> This could, of course, be described as “judicial leave” by another name. The Court of Appeal in *D* [2009] 2 Crim. App. R. 17 added insult to injury when it confirmed that these gateways are not even mutually exclusive.

- (b) the evidence is adduced by the defendant, or is given in answer to a question asked by them in cross-examination and intended to elicit it;
- (c) it is important explanatory evidence;
- (d) it is relevant to an important matter in issue between the defendant and the prosecution;
- (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant;
- (f) it is evidence to correct a false impression given by the defendant, or the defendant has made an attack on another person's character.

As if the existence of so many gateways, with so many alternative justifications for the admission of similar fact evidence, were not confusing enough, the Court of Appeal, in *Highton and Ors*,<sup>376</sup> subsequently ruled that:

. . . a distinction must be drawn between the *admissibility* of evidence of bad character, which depends upon it getting through one of the gateways, and the *use* to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted.

One might have expected that the *use* to which such evidence might be put would be restricted to the *reason for which* (i.e. the gateway through which) it was admitted.<sup>377</sup>

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<sup>376</sup> [2006] 1 Crim. App. R. 7, 131.

<sup>377</sup> But see also *Enright and Gray*, part of *Edwards and Rowlands and Ors.* (note 372), in which the Court observed, at 88, that “Bad character in section 98 is broadly defined. Its relevance will vary from case to case. Once admitted (no matter through which gateway) it can be used for any purpose for which it is relevant.”

Some of these gateways were also broadly defined, creating many new opportunities for Crown Counsel to justify the admission of similar fact evidence in circumstances in which it might never have been admissible at common law. There have already been several opportunities for the Court of Appeal to apply any judicial brake which was felt appropriate,<sup>378</sup> but none has been taken. For example, in *Chohan*,<sup>379</sup> a gateway (c) case, a key eyewitness in a robbery trial was allowed to bolster the credibility of her identification of the accused as the robber with evidence that she knew him as a drug dealer from whom she regularly bought heroin, although a less prejudicial alternative might have been to restrict the witness to testifying that she knew him socially.<sup>380</sup>

Nowhere in the Act was it more obvious that Parliament had “significantly ‘bent’ [the Law Commission’s proposals] to make evidence of the defendant’s bad character more readily admissible”,<sup>381</sup> than under the provisions of s 101(1)(d), which makes such evidence admissible when it is “relevant to an important matter in issue between the defendant and the prosecution”.<sup>382</sup>

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<sup>378</sup> The Law Commission had required that before such evidence might be admitted under *any* of its newly-proposed gateways, it should first be demonstrated that *either* “in all the circumstances of the case” the evidence would not be prejudicial to the defendant, *or* in “the interests of justice” the value of the evidence in understanding the case as a whole required its admission notwithstanding its prejudicial effect. This safeguard, in a diluted form, was attached to only two gateways in the Act, namely gateways (d) and (g).

<sup>379</sup> This case was one of the conjoined appeal cases reported under *Edwards and Rowlands and Ors* (note 372). See also *Frain and Unsworth* [2007] EWCA Crim 397, *Chapman* [2006] EWCA Crim 2545 and *Glenn* [2006] EWCA 3236 for examples of cases in which highly prejudicial evidence regarding an accused’s criminal past was admitted in order to strengthen the Crown’s theory that he was likely to be involved in a criminal organisation.

<sup>380</sup> See *Phillips v The Queen* (1985) 159 CLR 45.

<sup>381</sup> Spencer, note 363, at p. 7.

<sup>382</sup> The phrase “an important matter in issue” between the Crown and the defence is curiously reminiscent of Lord Herschell’s second statement of law in *Makin* (note 144). The relevance of similar fact evidence to “a matter in issue” had led to the admission of such evidence in the pre-*Makin* cases from which Lord Herschell’s second statement of law in that case had been constructed; see, e.g. *Francis*, note 92. It remained to be seen how “importance” would be interpreted.

Section 112(1) of the Act defines an ‘important matter’ as “a matter of substantial importance in the context of the case as a whole”, while s 103(1) includes,<sup>383</sup> within the definition of the “matters in issue” between the parties (a) the defendant’s “propensity to commit offences of the kind with which he is charged”, and (b) their “propensity to be untruthful”.<sup>384</sup>

By this legislative sleight-of-hand, an accused’s “propensity”, in either category, has been made an “important matter” in issue between the Crown and the defence. This has made possible the re-opening of doors long since believed to be closed at common law.<sup>385</sup> At the same time, s 103(2) provides that *one* of the ways of proving “propensity” may be by reference to the defendant’s previous conviction of an offence of “the same description”, or in “the same category” as that with which they are currently charged.

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<sup>383</sup> The legislative origins of s 103 are further testimony to the determination of the government of the day to ensure that as much as possible of an accused person’s murky past be revealed to the jury. What is now contained within the section was originally part of another ‘gateway’ proposed by the Government, but not part of the Law Commission’s recommendations. Trenchant opposition to this additional gateway during Parliamentary debate led to its removal, followed by its somewhat arrogant re-insertion as a form of evidence admissible under the ‘important matter’ gateway.

<sup>384</sup> In each case, the subsection contains the curious proviso that such factors may not be considered if they bear no relevance to the defendant’s likely guilt, or truthfulness, on the instant occasion. Not only did this appear to underline the obvious, but it betrayed the true agenda lying behind the provision, namely to legitimise the admission of as much “bad character” evidence as possible in pursuit of a conviction. It was in fact a compromise at the Debate stage of the Bill’s passage through the Lords, designed to restrict the application of such evidence to matters which were still truly “live” between the parties: see Hansard, HL vol 654, col. 2080 (20 November, 2003). For post-2003 Act Court of Appeal decisions on what may be regarded as “live” issues in a trial, see *McKenzie* [2008] EWCA Crim 758, *Bullen* [2008] 2 Cr. App. R. 25, and *L* [2006] EWCA Crim 2988.

<sup>385</sup> For example, in *DPP v Kilbourne* (note 194), it was held that an accused’s homosexual proclivities did not single them out as part of a sufficiently small population to have probative value in proving their guilt of homosexual offences. But, were the facts of *Lewis* (note 288) to be reproduced post-2003, a man’s paedophilic leanings might be sufficient to secure a conviction for child sexual abuse. The argument would be that “A paedophile has the propensity to commit sexual offences against children, therefore this propensity is admissible under s 103(1).” Little wonder that Professor Spencer was of the opinion, shortly after the Act came into force (note 363, at p. 51), that “. . . the bad character of the defendant has become admissible in a far wider range of situations than it was at common law.”



The allocation of cases into “categories” was to be done by subsequent subordinate legislation, which at the time of writing has resulted in only one Order.<sup>386</sup> The philosophy behind the creation of these categories appears to be that a “propensity” to commit one offence within that category may be demonstrated by evidence of conviction(s) for another offence in the same broad category. Not only are these categories far from comprehensive of all types of criminal offence - one obvious missing category group being that relating to personal violence – but they fail to acknowledge that even *within* each such category, there are wide variations in criminal “propensity”. For example, in the “Theft” Category prescribed under the 2004 Order, there is unlikely to be any natural connection between an opportunistic sneak “theft”, and a highly organised “armed robbery in company”. Equally, in the “Sexual Offences (Persons Under 16)” Category, “rape” and “incest” with one’s own under-aged daughter are likely to require wholly different perverted tastes.

As a further “belt and braces” exercise, the wording of s 103(2) leaves it open for “propensity” to be proved in other ways. As the Court of Appeal explained in *Hanson and Ors*:<sup>387</sup>

. . . . section 103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient, in order to show propensity, that a conviction should be of the same description or category as that charged.

Another difficulty with the use of an accused’s “propensity” as “an important matter in issue” between Crown and defence under gateway (d) arises in respect of an

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<sup>386</sup> The *Criminal Justice Act 2003 (Categories of Offences) Order 2004*; *SI 2004/3346*. This Order creates “prescribed categories of offences” for both “Theft” and “Sexual Offences (Persons Under the Age of 16)”.

<sup>387</sup> [2005] 1 WLR 3169, at 3172. See also *Weir and Ors*, note 369, at 313, in which the Court reconfirmed that the “categories” approach was only one way of proving an accused’s “propensity” to commit a particular crime.

*alleged* “propensity” which has yet to be tested in a criminal trial, as in cases such as *Smith*,<sup>388</sup> and *Boardman*.<sup>389</sup> Decisions such as this had been permissible in an age in which “a strong nexus of similarity” justified admissibility. It remained to be seen whether or not evidence which tended to demonstrate “propensity” on the part of an accused would still be admissible under gateway (d) in cases in which there was *no* such strong nexus. The answer to this question was “yes”, according to the Court of Appeal in *Wallace*.<sup>390</sup>

The case involved an indictment containing four armed robbery counts. Evidence showing W to be linked circumstantially to each of them, without displaying any strong nexus of similarity between them, was held to be admissible in order to prove his involvement in them *all*. This was despite the fact that, from the perspective of each individual count, he was simply being shown to possess a “bad character”. Based on the decision in *Wallace*, Professor Spencer concluded that:<sup>391</sup>

. . . the result will be that where counts for different offences are properly joined, it will happen more frequently than in the past that the evidence on one count is admissible on the other.

Almost all the academics who commented on the Act itself, and its early interpretation by the Court of Appeal, were highly critical of gateway (d),<sup>392</sup> and its failure to deliver the practical clarity to the law which the Law Commission had

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<sup>388</sup> See note 180.

<sup>389</sup> See note 235.

<sup>390</sup> [2007] 2 Cr. App. R. 30.

<sup>391</sup> Note 363, at p. 88. See also Omerod and Fortson, ‘Bad Character and Cross-admissibility’, [2009] Crim L R 313.

<sup>392</sup> See, e.g. Tapper, note 347, at 542, and Waterman and Dempster, note 373, at 621-5.

advocated. Typical of such criticism, and summative of all the complaints which gateway (d) attracted, is this passage from Waterman and Dempster.<sup>393</sup>

The use of the word “substantial” was intended by the Law Commission to represent a type of “enhanced relevance” for the evidence to be admissible at the instigation of the prosecution. The word “substantial” does not, however, appear in gateway (d) . . . . The words “relevant to an important matter in issue” cannot therefore be read as requiring any “enhanced relevance”. Similarly, there is no reference to setting the probative value of the evidence against the potential prejudicial effect. These features are contrary to the recommendations of the Law Commission . . . .

The call to balance probity against prejudice had been regarded by many as a judicial Pentecost,<sup>394</sup> but in *Weir and Ors*,<sup>395</sup> it was dismissed as “obsolete” under the new legislation. This was hardly surprising, given that the touchstone to admissibility under gateway (d) appears to be solely that of “propensity”, without any reference to “prejudice”. It was presumably judicially convenient to overlook the fact that the House of Lords, three decades earlier,<sup>396</sup> had condemned reasoning from propensity alone because it leads to “forbidden reasoning”.<sup>397</sup>

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<sup>393</sup> *Ibid*, at 621-2. See also Tapper, note 347, at 542. Andrew Ashworth (in [2004] Crim L R 516, at 517) went so far as to allege that “Vote-winning and populism appear to hold greater sway with the Government than respect for rights”.

<sup>394</sup> Hoffman had spoken for most when he described it as “an intellectual breakthrough” – see note 266.

<sup>395</sup> Note 369, at 320. The factual scenarios of the *Weir* group of cases showed only too clearly how far the Court of Appeal was prepared to retreat from the high ideals of *Boardman*. In *Weir* itself, the Court upheld the admission, on a charge of indecently assaulting a 10 year old girl, of evidence of W’s caution, five years previously, for taking an indecent photograph of a young girl, while in *Somanathan*, in which S was charged with the rape of a “vulnerable” member of his religious congregation, it approved the admission of evidence of the manner in which S had “ingratiated” himself with other vulnerable female members of the same congregation.

<sup>396</sup> In *Boardman*; see note 252.

<sup>397</sup> This argument is supported by Waterman and Dempster, note 373, at 624.

As Waterman and Dempster concluded,<sup>398</sup> on the basis of these and other cases,

... the criticism levelled at similar fact evidence by the Law Commission is even more applicable to the present state of the law, despite one of their main aims in recommending a change in the law being to clarify the practical application of it.

Section 101(d) was not the only “gateway” which had the potential to become a floodgate. Section 101(f) allows for the admission of similar fact evidence in order to “correct a false impression given by the defendant”. It was arguable that the “false impression” referred to was intended to relate to one regarding the accused’s *character*, and not the facts of the case. It has, indeed, been used for the former purpose.<sup>399</sup> But in another series of cases,<sup>400</sup> the Court approved the admission of evidence regarding an accused’s bad character in response to the line of defence which they were running regarding their involvement in the matter on trial. For example, in *Bernasconi*, that he was trying to maintain the peace rather than act as the aggressor in an offence of violence.

Other possible invalid applications of gateway (f) can be predicted, most obviously whether or not a previous *charge* or *acquittal* (as opposed to a conviction) can be called in aid by the Crown to breach the facade of good character which an

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<sup>398</sup> *Ibid*, at 625.

<sup>399</sup> For example, in *Amponsah* [2005] EWCA Crim 2993, a conviction for theft was admitted against an accused who had set herself up as “a hard working, truthful, church-going individual”, while in *Somanathan* (note 395), a Hindu priest charged with raping a vulnerable member of his congregation who claimed to have a good reputation in another temple in which he had previously been employed was proved to have been dismissed from that position because of his untruthfulness and his indiscretions involving similarly vulnerable women. These were clearly all cases in which the accused, had, in the words of Professor Spencer (note 363, at p. 108), made “... an ostentatious parade of [their] non-existent good character in [their] evidence in chief”.

<sup>400</sup> For example, *L* (note 384), *Bernasconi* [2006] EWCA Crim 1052, and *S* [2007] EWCA Crim 1387. Spencer (note 363, at p. 106) expressed the hope that “... the Court of Appeal will find the occasion to condemn this error for what it is”. So far, it has not.

accused has created for themselves.<sup>401</sup> The old law has already been surpassed in its previous application by s 105(2)(b), which includes, within the various circumstances in which an accused can set themselves up under gateway (f), the possibility of their creating a “false impression” during their preliminary and post-charge conversations with police. However, the Court of Appeal, in *B*,<sup>402</sup> drew the line against the use, against an accused who had denied a police question as to whether or not he had any sexual interest in children, of evidence to the effect that at some time in the past he had shown a child a pornographic book.

While it may eventually prove to be the case that gateway (f) will only be employed when it was traditionally employed at common law, it may equally well be cynically employed to generate other dubious grounds upon which an accused’s “bad character” may be revealed to a jury. Likewise with another gateway, s 101(g), which applies whenever it may be said that the accused has “made an attack on another person’s character.”

Under the previous regime of s 1(3)(ii) of the *Criminal Evidence Act 1898* (E & W),<sup>403</sup> a defendant who ran a defence which cast “imputations on the character of” virtually anyone involved in the case against them (but most notably the victim) ran the risk of having their own criminal history revealed to the jury. This was done, notionally, in order to cast a new light on that defendant’s credibility as a witness, but, given the risk that the jury might employ it in order to engage in either “reasoning” prejudice,<sup>404</sup>

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<sup>401</sup> There was said to be “no blanket answer” to this type of question in *U* [2008] EWCA Crim 1457, in relation to a matter which had yet to come to trial.

<sup>402</sup> [2008] EWCA Crim 1850. It would be all too easy for the police, in circumstances such as this, to frame their questioning so as to expose a suspect, later an accused, to the revelation of their spotted past, just as it is one of tricks of the trade of Crown Counsel to cross-examine an accused in such a way as to goad them into blurting out some protestation of good character which will not withstand the cold wind of scrutiny. Thankfully, in *Good* [2008] EWCA Crim 2923, the Court of Appeal declined to impliedly approve such a tactic when an accused was harassed into blurting out “I’m not that type of person”, ruling that the evidence that he indeed *was*, which Crown Counsel had been attempting to have admitted, should have been excluded.

<sup>403</sup> This was formerly s1(f)(ii) of the same Act.

<sup>404</sup> This might happen if the previous offences were similar in nature to the instant ones.

or “moral” prejudice,<sup>405</sup> it was made subject to judicial discretion regarding the admission of the evidence in the first place, and in practice required a “propensity warning” from the trial judge.<sup>406</sup> A disadvantage with this arrangement, from a Crown perspective, was that a defendant could attack the character of the victim with impunity for as long as they (the defendant) remained out of the witness box.<sup>407</sup>

There was also the dilemma caused by the genuine need of a defendant to cast aspersions on the character of either the victim (e.g. by alleging that his so-called rape victim was in fact a consenting promiscuous person) or one of the other Crown witnesses (e.g. a drugs officer alleged to have “planted” the drugs on the suspect). This led in due course to some complex, and occasionally inconsistent, case-law regarding whether or not the aspersions being cast were an “essential part of” an accused’s defence (in which case the heavy hand of the subsection would be stayed) or not (in which case the sanction would be applied).

The Law Commission had sought to resolve all these difficulties in one tortuous provision,<sup>408</sup> which balanced out the concerns at both ends of the bar table, but the U.K. Government of the day had other ideas. Lying behind the innocuous-seeming gateway (g) lies s 106, under which there is no relief granted to a defendant who finds that they cannot adequately run a valid defence without casting character aspersions on the

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<sup>405</sup> This risk might arise if, for example, the previous behaviour was morally repulsive, as in the case of child molestation.

<sup>406</sup> This was to the effect that the evidence could only be used for the purpose for which it had been adduced, and could not necessarily be used to infer guilt directly.

<sup>407</sup> This was because the subsection permitted a Prosecution counter-attack only by way of questions asked of an accused in cross-examination; see *Butterwasser* [1948] 1 K.B. 4. Another technical side-effect was the original requirement that the person whose character was attacked be either “the prosecutor” (which in practice meant the victim) or one of their witnesses. Until a 1994 amendment to the previous provision, this meant that a defendant could defame the character of a non-witness victim (e.g. the deceased in a murder trial) without mercy, and with no fear of any “tit-for-tat” repercussions allowing their own bad character to be revealed.

<sup>408</sup> Clause 9 of its draft Bill.

victim, a Crown witness, or one of the investigating police.<sup>409</sup> Not only that, but the “bad character” evidence adduced against the accused in response may be led in chief, and therefore does not depend upon whether or not that accused elects to give evidence on oath.

The situations in which an accused may be said to have brought this particular roof down on their head may also have subtly expanded with the definition of “character” found within s 106(2)(b) of the Act, which henceforth includes an allegation that the person being maligned by the accused has behaved “in a reprehensible way”. This exposes an accused to the vagaries of changing social mores when assessing whether or not their defence alleges “reprehensible” conduct on someone’s part.<sup>410</sup>

The Law Commission had also recommended that judicial leave be obtained before what is now gateway (g) was invoked. This recommendation was excluded from the Act, although such evidence may still be caught under the “fairness” provisions of either s 101(3) or s 78 of *PACE*.

Further complications arise from the fact that gateway (g) may be opened when an accused attacks the character of *any* “person”,<sup>411</sup> which involves potentially many

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<sup>409</sup> The Law Commission had proposed an exception when the imputation cast by the accused “had to do with” the facts of the case, or related to alleged misconduct by the investigating or prosecuting authorities. This did not find its way into the Act.

<sup>410</sup> Emerging social evils which have received adverse public comment in recent years include wife-beating, cyber-bullying and child pornography. If, for example, a High School student in future claims the defence of “provocation” to an allegation of assault, based on the fact that they were being bullied on “Facebook” by the victim, will this be classed as an allegation of “reprehensible” behaviour on the part of the victim, entitling the Crown to cite the accused’s previous assaults on fellow students?

<sup>411</sup> As explained above, the pre-1994 law only applied in respect of character assassinations of “the prosecutor” or one of their witnesses. There is also doubt as to whether or not the use of the phrase “any person” blocks the former loophole (referred to above) when the person being maligned is now deceased. Professor Spencer (note 363, at pp. 113-4) is of the opinion that the phrase *is* apposite to cover a deceased person, in conformity with the post-1994 law immediately prior to the passing of the Act. He

more categories of people than the former law, and the full extent of this change has yet to be tested.

In fact, gateway (g) has kept the Court fairly busy already. In *Ball*,<sup>412</sup> the Court of Appeal confirmed that a defendant may open gateway (g) long before the start of their trial, by attacking the character of a complainant during conversations with investigating police, while in *Edwards*,<sup>413</sup> the Court confirmed that it is not necessarily “unfair” for the trial judge, having declined to admit bad character evidence against the accused through gateway (d), to allow it in later under gateway (g), when the accused goes on to launch an attack on the character of some of the Crown witnesses.

The Law Commission had recommended that the bad character of an accused admitted under gateway (g) should continue, as under the old law, to be admissible only as to their credibility as a witness, and not the likelihood of their guilt. However, in *Highton and Ors*,<sup>414</sup> the Court held that:

In the case of gateway (g) . . . admissibility depends upon the defendant having made an attack on another person’s character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged.

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also cites Rose LJ in *Hanson and Ors.* (note 387, at 3171), who opined that gateway (g) encompassed character attacks on victims “whether alive or dead”. But at least one textbook writer (Munday, *Law of Evidence*, (4<sup>th</sup> ed, Oxford, OUP, 2007), at 7.87) has expressed a contrary view, and this is clearly a matter for a more authoritative statement from a future House of Lords.

<sup>412</sup> Part of *Renda and Ors.* (note 370). In this case, a rape accused, while being questioned by police, referred to his alleged victim in terms which depicted her as sexually promiscuous, and his previous criminal history was allowed through gateway (g). The Court did, however, further confirm that trial judges should be on the alert for the tactical use of such interviews by the Crown, so as to enable gateway (g) to be opened. The same concern might apply under gateway (f), where during interview the suspect claims to possess a better character than they actually enjoy; see *B*, note 402.

<sup>413</sup> [2006] 1 Cr. App. R. 3.

<sup>414</sup> Note 376, at 131, confirmed in *Campbell* [2007] 1 W.L.R. See also *George* [2006] EWCA Crim 1652, *Lamaletie* [2008] EWCA Crim 314 and *Singh* [2007] EWCA Crim 2140.



This decision has, justifiably, attracted a great deal of learned criticism,<sup>415</sup> not least because it provides a “back door” gateway to admission for a Crown Counsel who has failed to justify the admission of “bad character” evidence under gateway (d), on the basis of its “relevance” to an “important matter in issue” between the parties in the trial. If it is not sufficiently “relevant” from *that* perspective, goes the argument, then why should the same prejudicial evidence be admitted, for the same purpose, in a context in which it is arguably *less* relevant?

Professor Spencer, in his work,<sup>416</sup> defends the Court of Appeal’s ruling on the basis that “bad character” is not divisible into two groups labelled “credibility” and “propensity”, and that it is “counter-intuitive” to advise a jury trying a person for shoplifting who claims absent-mindedness, against whom evidence is led of prior convictions following the same failed defence, that they may use that person’s “previous” only in relation to their likely truthfulness, and not their propensity to steal from shops while claiming absent-mindedness.

With respect, it is precisely *because* juries are not capable of such sophistry that judges are required to give them clear guidance via “propensity warnings”. Given our knowledge that juries cannot easily avoid arguing from “credibility” to “guilt”, we should in fact be *avoiding* situations in which bad character evidence is admitted solely on the issue of credibility. We should *not* increase the number of opportunities for “forbidden reasoning” to covert credibility into guilt. It is wrong to use the inability of the average jury to make the distinction in practice as an excuse for not even attempting

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<sup>415</sup> See, e.g. Munday, ‘The Purposes of Gateway(g): Yet Another Problematic of the Criminal Justice Act 2003’, [2006] Crim L R 300, and the commentary in [2005] Crim L R 869.

<sup>416</sup> Note 363, at p. 119. His example is, of course, based on a rare situation in which “credibility” and “guilt” cannot be separated. This will rarely be the case; would he be able to defend the same argument if the accused is this time accused solely of having assaulted a store security officer in an attempt to escape prosecution?

to make the same distinction in law. Professor Spencer, however,<sup>417</sup> nails his colours high on the mast with the assertion that:

. . . it is a good thing that [propensity] directions no longer have to be given on these confusing lines.

It will perhaps remain to be seen whether or not it is “a good thing” for a jury to be advised, unnecessarily, of an accused’s discreditable past, when deciding upon their guilt of a new charge.

### **More routes to conviction**

The English Parliament clearly succeeded in its declared objective of bringing the murky history of an accused more frequently to the attention of a jury trying them for a new offence, and thereby “jailing more criminals”, under the thin veneer of “making more evidence available” to a court. Apart from the lengthy list of prescribed ‘categories’ of admissibility (labeled “gateways”, so that it was not accused of reinstating the post-*Makin* regime), some of the background definitional provisions it inserted into the 2003 Act (considered above) have considerably widened the field from which an accused’s prior misdeeds may be harvested.

By contrast, the amount of legislative space devoted to the “prejudice” half of what had once been regarded as the formula for the future is intentionally minimal. Only in s 101(4) is there a reference to the fact that evidence should not be admitted

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<sup>417</sup> *Ibid*, at p. 120.

under one of the ‘gateways’ of s 101(d) or (g),<sup>418</sup> if it would have “an adverse effect on the fairness of the proceedings”. “Fairness” is not defined anywhere in the Act (in marked contrast to the definitional attention paid to expanding “relevance”), and the word ‘prejudice’ is absent altogether, even though the Law Commission’s original recommendation had required the balancing of probity and prejudice as a pre-condition of admissibility under *any* category.<sup>419</sup>

A further five sections of the Act (ss 102-6) are devoted to explaining how each of the admission categories are to be interpreted, while s 109 requires trial judges assessing the “probative value” of a proposed item of evidence (but *not*, it will be noted, any possible “prejudicial effect”) to assume that it is true; only if it later turns out to be “contaminated” is the trial judge required to either abort the trial or direct the jury to acquit, and even then only if the alternative would be an “unsafe” conviction.

The net effect of the Act was not so much a stacking of the cards against an accused as the supply of a ‘rigged’ deck with which to play. This legislative approach mirrored that of the United States a generation earlier,<sup>420</sup> and it had the same political agenda. The governments of both nations clearly believed that playing with a straight deck decreased the number of convictions; whether or not they are convictions of which a nation could be proud is a debate worthy of a whole thesis of its own.

For the purpose of *this* thesis, it can be observed that the English statutory regime has obscured what could have been the clarity of the law governing the admissibility of ‘bad character evidence’ to the point of virtual impenetrability. The

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<sup>418</sup> This proviso does not apply to the other gateways of s 101, despite the Law Commission’s original recommendation that it should – see note 378.

<sup>419</sup> Note 378.

<sup>420</sup> See Chapter 5.

2003 Act has in effect divided evidence of previous misconduct by an accused into three different categories, with three different tests of admissibility.

*1. Outside the Act completely.*

The first category is evidence of previous misconduct which is *neither* “to do with” the facts of the Prosecution case against the accused, *nor* connected in some way with the “investigation or prosecution” of that case, *and* does not fit within one of the “gateways” of s 101.<sup>421</sup> Such evidence is not covered by the Act at all, and to such evidence, the old common law rules still apply. In respect of such evidence, and in accordance with *Boardman*, “probity” must outweigh “prejudice”, and it would seem that the “fairness” test of s 78 of *PACE* will also apply.<sup>422</sup>

*2. Admissible without leave under s 98*

The second category of case is that in which the evidence *does* either have “to do with” the facts of the Prosecution case against the accused, or connect in some way with the “investigation or prosecution” of that case. Such evidence is now admissible without leave under s 98 of the Act. It will no longer even be classed as “bad character evidence”, and the old common law rules which had previously required “probity” to outweigh “prejudice” will no longer apply to this category of similar fact evidence.<sup>423</sup>

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<sup>421</sup> Given the potential breadth and scope of these provisions, however, it is unlikely that much evidence will escape in this way.

<sup>422</sup> The evidence in *Manister* came within this category – see note 369.

<sup>423</sup> Arguably, however, this type of evidence will still attract the provisions of s 78 of *PACE*, and could be excluded if, in the opinion of the trial judge, it would be “unfair” to admit it.

### 3. *Admissible only with leave through a “gateway”*

Finally, there are those cases in which the evidence is not automatically admissible without leave because of its connection with either the Crown’s factual case or the investigation or prosecution of it. Such evidence will henceforth be admissible if it can be argued through one of the “gateways” identified under s 101 of the Act. These gateways have been liberally interpreted in the Crown’s favour. They are also capable of manipulation by conviction-hungry prosecutors, and the case-law to date has widened them even further by means of questionable applications of the concept of “relevance”. By contrast, “prejudice” is now an obsolete concept, replaced by a half-hearted concession to “fairness”, a term less easy to define.

## **Conclusion**

In all of this, English law has forfeited any prospect of testing the advisability of admitting bad character evidence by comparing and contrasting measurable factors of “probity” and “prejudice” in an exercise intended to identify the logical relevance of such evidence to the case in hand. What Wigmore might have termed “the calculus of admissibility”, as a natural extension to his “doctrine of chances” philosophy, has finally been abandoned under English law.

This has been a policy process in which the appeal courts have been complicit. The lesson which might be learned from the English experience is that any future statutory intervention should not only establish tight guidelines designed to admit only similar fact evidence which is truly relevant to the case for the right reason, but should also oblige the trial judge to have regard, on the record, to those factors taken into account when assessing admissibility.

## Chapter 5:

### United States law

#### Chapter synopsis

In its early years, United States law on ‘bad act’ evidence was not only no different from the law in England, it was effectively identical to it. English case precedents were adopted in American cases, and American legal texts were little more than English treatises under different covers.

The American equivalent of *Makin* was the New York Courts of Appeal’s 1901 decision in *People v Molineux*, which confirmed that bad act evidence was not admissible solely to prove guilt from propensity, but that it might be admitted for *other* purposes, some of which it identified. This led American law down the same ‘categories’ road that bedevilled English law until *Boardman*. Unfortunately there was no similar ruling in America which would indicate that a broader, more principled, approach might be better.

The result was a growing list of confusing, overlapping and occasionally contradictory case precedents which cried out for clarifying legislation. The legislation which followed merely perpetuated the ‘categories’ approach, and America’s legacy to the overall debate on the admissibility of bad act evidence emerges as a powerful argument against any attempt to categorise in this way.

## The early influence of English precedent

Many of the more influential pre-*Makin* English cases considered in Chapter 2 were regularly relied upon by the American courts.<sup>424</sup> The same ‘categories’ of cases in which ‘bad act’ evidence had been admitted in England became the same categories across the Atlantic, to the point at which US law was a mere mirror image of its English counterpart. Only the case names were different.<sup>425</sup>

Gradually, the courts began to focus less on the *type of case* in which such evidence might be admitted, and more on the precise *purpose* for admitting it. Opinions varied, from the orthodox view, in *Rando*,<sup>426</sup> that it demonstrated the necessary “guilty knowledge”, to the more pragmatic opinion, expressed in *Jacob*,<sup>427</sup> that there was no way of proving such knowledge other than by reference to other actions by the accused. These ‘other actions’ were said, in *Morgan*,<sup>428</sup> to be evidence of “a systematic plan” by the accused, while in *Shriedley*,<sup>429</sup> it was said that such evidence “. . . when taken in connection with other circumstances . . . might strongly tend to fasten guilty knowledge upon the defendant”.<sup>430</sup>

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<sup>424</sup> The most important of these were *Ball* (note 68), *Cole* (note 118), *Whiley and Haines* (note 65), and *Dunn* (note 79).

<sup>425</sup> Typical of this process were cases such as *State v Van Houten* (1810) 3 N.J.L. 672, a New Jersey Supreme Court decision, and *Wood v United States* (1842) 41 U.S. (16 Pet.) 342, a federal case, both of which followed *Whiley and Haines* in allowing in evidence of previous acts by an accused in order to demonstrate dishonest intent. As in England, this reasoning then transferred by analogy from cases of forgery and uttering into cases relating to the receipt of stolen goods; see, for example, *People v Rando* (1857) 3 Park Cr 335 (N.Y.), *Devoto v Commonwealth* (1861) 60 Ky. (3 Metc.) 417, *Commonwealth v Charles* (1871) 14 Phila. Rep. 663, *Shriedley v State* (1872) 23 Ohio St. 130, *State v Jacob* (1889) 8 S. E. 698 (S.C.), and *Morgan v State* (1892) 18 S. W. 647 (Tex. Crim. App.). There were then a number of cases (such as *Bottomley v United States* (1842) 1 Story’s Rep. 135, *Commonwealth v Stone* (1842) 45 Mass. (4 Metc.) 43, *Commonwealth v Shepard* (1861) 83 Mass. (1 Allen) 575, and *Trogden v Commonwealth* (1878) 72 Va. (31 Gratt.) 862), in which bad act evidence was admitted in order to prove the necessary intent in cases alleging dishonesty *generally*.

<sup>426</sup> Note 425.

<sup>427</sup> Note 425.

<sup>428</sup> Note 425, at 648.

<sup>429</sup> Note 425, at 142.

<sup>430</sup> The expression “guilty knowledge” can be made to incorporate the concepts of “intent”, or “lack of accident”, as it had by the date of *People v Seaman* (1895) 65 N.W. 452 (Mass.). Close adherence to

This was the same ‘categories’ approach which, as in England, prevented the identification and development of any broader underlying logical basis for admissibility. As Leonard puts it:<sup>431</sup>

Rather than asking exactly how the evidence was relevant on a non-character basis, the courts’ opinions tended to focus on the kind of case and on the broad purpose for which the evidence was offered.

It was also realised by US courts at an early date that the admission of such evidence brought with it a risk of prejudice against an accused. But whereas in *Trogden*,<sup>432</sup> the Virginia Supreme Court had specified the principal prejudice to the accused to be “. . . to require him to answer for two offences”, the equivalent Massachusetts court, in *Shepard*,<sup>433</sup> ruled that “. . . a party is not to be convicted of one crime by proof that he is guilty of another”.

The same recognition of the risk of “reasoning prejudice” was to occur under English law, but in the USA the probative value of the bad act evidence was being compared directly with its prejudicial potential a century earlier than *Boardman*. In *Gassenheimer v State*,<sup>434</sup> for example, a conviction for receiving stolen cotton was overturned (“reversed”, to use the American expression) because of the admission of evidence of persons seen entering G’s storehouse with full sacks and leaving with

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English precedent was also to be found in early American homicide cases. For example, the influential English authority of *Geering* (note 99) was relied upon in argument by the prosecution (although not cited by the court) in *Commonwealth v Robinson* (1888) 16 N.E. 452 (Mass.).

<sup>431</sup> *The New Wigmore. A Treatise on Evidence: Evidence of Other Misconduct and Similar Events*, (2011) Aspen Publishers, USA (hereafter ‘Leonard’), at § 3.4.

<sup>432</sup> Note 425, at 870.

<sup>433</sup> Note 425, at 581-2.

<sup>434</sup> (1875) 52 Ala. 313.



empty ones.<sup>435</sup> It was observed, on appeal,<sup>436</sup> that while there appeared to be no “legitimate tendency” for this evidence to prove the guilt of the accused, it “. . . doubtless alarmed the suspicions of the jury, and inclined them the more readily to believe in the guilt of the [accused]”, because of “. . . the vague inferences which unreasoning suspicion would draw from them”.

### US law falls into the ‘categories’ pit

By adopting the English approach, the American courts were led down the same road of ‘categories’ of admissibility,<sup>437</sup> where they encountered the same potholes and landmines. They also adopted the same attitude towards established case precedent as their English counterparts. The result was that, as the case-law began to build up:<sup>438</sup>

If the facts of the pending case permitted the prosecutor to rely on a previously approved theory on the list, the theory sometimes served as a passport to admissibility with an almost “open sesame” effect.

Imwinkelried<sup>439</sup> attributes the ongoing adherence to a “list approach” in large part to the New York Courts of Appeal’s decision in *People v Molineux*,<sup>440</sup> in which the

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<sup>435</sup> There was no evidence that these sacks even contained cotton, let alone *stolen* cotton.

<sup>436</sup> At 319.

<sup>437</sup> Imwinkelried, “The Evolution of The Use Of The Doctrine of Chances As Theory Of Admissibility For Similar Fact Evidence”, (1993) 22 Anglo-Am. Law Rev. 73 (hereafter “Imwinkelried 1993”), at 79, describes it as “[a] “list” approach”. Julius Stone also observed (Stone, “The Rule of Exclusion of Similar Fact Evidence: America”, (1938) 51 Harvard L. Rev. 988 (hereafter “Stone, America”), at 991, that “. . . the rule under discussion . . . was adopted bodily from the English books into the American law”.

<sup>438</sup> Imwinkelried 1993, note 437, at 80. See also Stone (note 437), at 1007, who described the list approach as “spurious and fallacious”, and Slough, (1978) “Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revised”, 26 Kan. L. Rev. 161, at 167.

<sup>439</sup> Note 437, at 86.

<sup>440</sup> (1901) 61 N. E. 286, at 293-4 (N.Y.). This principle had a much older pedigree in the USA; see *Commonwealth v Hardy* (1807) 2 Mass. Rep. 303 and *Walker v Commonwealth* (1829) 28 Va. (1 Leigh)

contrasting principles which had been handed down by Lord Herschell in *Makin* were confirmed, albeit in somewhat different language, for America. So far as concerned the first (exclusionary) principle, it held that:

. . . . the state cannot prove against a defendant any crime not alleged in the indictment. . . . as aiding the proofs that he is guilty of the crime charged. . . . This rule [is] universally recognised and . . . firmly established in all English-speaking lands . . .

It then went on to list, as exceptions to that general principle, evidence adduced to prove “motive”, “intent”, the absence of “mistake” or “accident”, a “common scheme or plan”, and “identity”. Leonard also observes,<sup>441</sup> of “This . . . categorical approach to uncharged misconduct evidence”, that it “. . . would prove extremely influential in the development of the law”.

The lasting legacy of *Molineux* was that the American courts either missed – or chose to overlook – the warning of Lord Cross, in *Boardman*,<sup>442</sup> that it is a fruitless task seeking “. . . to compile an exhaustive list of the sort of cases in which similar fact evidence is admissible”, and that a broader basis for admissibility should be sought. As a result, in the USA it continued to be ‘business as usual’ in the US courts, in respect of an increasing number of categories of case.

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574. *Molineux* is still being cited in New York, for example in *People v Rojas* (2001) 735 N. Y. S. 2d 470 (N. Y.).

<sup>441</sup> Note 431, § 3.3.1. Imwinkelried (note 437), at 86, adds that the lead judgment in that case “. . . repeatedly referred to the theories as “exceptions”. That terminology implied that there was a general rule excluding uncharged misconduct testimony . . . the prosecution had to bring the testimony with an “exception” to the rule. As more and more courts adopted the “exception” terminology from *Molineux*, a “pigeonholing” mentality developed”.

<sup>442</sup> Note 235, at 457. Lord Hailsham, *ibid*, at 452, also warned against “categorisation” and the application of “labels”.

The last flickering hope of a broader-based approach, arising out of the logic of the elimination of chance, was raised by the Court of Appeals for the Fourth Circuit in *United States v Woods*,<sup>443</sup> which appeared to favour the same logic which Windeyer J had adopted at the NSW stage of *Makin*.<sup>444</sup> The case was factually close to *Makin*, involving a mother accused of murdering her foster son by smothering him (a cause of death known medically as “cyanosis”). To rebut W’s defence of accident, the prosecution was allowed to lead evidence of 20 other incidents of cyanosis in nine young children in her care. Perhaps surprisingly, the defence were able to argue – accurately – that there was no case precedent in that Circuit for such use of bad act evidence. On appeal, however, the Court ruled,<sup>445</sup> that such an approach was “too mechanistic”, and cited both *Makin* and *Smith* for the ruling that the evidence was admissible because the large number of similar deaths served to render unlikely the explanation of accident on the instant occasion.

However, the wholesale adoption, in federal cases, of a full-blown “doctrine of chances” approach was not to be. Significantly, *Woods* was taken, in later cases closely analogous to it, to have established only a case precedent for employing bad act evidence to prove the *actus reus* by disproving “accident”.<sup>446</sup> A decade or so later, this had broadened in order to allow the same argument in proof of *mens rea*.<sup>447</sup> But when it came to proof of *identity*, the accent was back on a *modus operandi* category approach; as Imwinkelried observed as late as 1993:<sup>448</sup>

. . . to date, the American courts have not analysed *modus operandi* cases in terms of the doctrine. They either do not recognize the probabilistic rationale underlying the modus theory or are unwilling to explicitly extend the doctrine.

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<sup>443</sup> (1973) 484 F. 2d 127 (4<sup>th</sup> Cir.).

<sup>444</sup> See note 135.

<sup>445</sup> At 134.

<sup>446</sup> See Myers and Carter, “Proof of Physical Child Abuse”, (1988) 53 Mo. L. Rev. 189, at 214-5; Myers, “Uncharged Misconduct Evidence in Child Abuse Litigation”, [1988] Utah Law Rev. 479, at 521.

<sup>447</sup> *United States v York* (1991) 933 F. 2d 1343 (7<sup>th</sup> Cir.).

<sup>448</sup> Note 437, at 90. He is referring to the doctrine of chances.

To further exacerbate the problem, the courts in practice began to demonstrate a pro-prosecution attitude towards the proliferation of ‘categories’, until “. . . by the time the Federal Rules were adopted, the courts were admitting uncharged misconduct evidence fairly freely.”<sup>449</sup> At approximately the same time, one of America’s leading academics in this area,<sup>450</sup> was describing the admission or rejection of bad act evidence as “. . . the single most important issue in contemporary criminal evidence law”.

### **No warning bells from the academics**

The academic commentators who could have argued against – and perhaps even prevented – the formalisation of the ‘categories’ approach into legislation, instead expended their energy on debating whether “the rule” which had developed by case-law was *exclusionary* or *inclusionary*.<sup>451</sup>

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<sup>449</sup> Leonard, note 431, at § 4.3.2.

<sup>450</sup> Imwinkelried, (1986) “Uncharged Misconduct”, 1 Crim. Just. 6, at 7 (hereafter “Imwinkelried 1986”).

<sup>451</sup> Leonard (note 431, at § 2.1) commented that the ‘exclusionary’ approach of Nineteenth Century English law “proved enormously influential in the development of contemporary . . . American law”, requiring, as it did, that the Prosecution fit the desired evidence “. . . within a number of specifically delineated exceptions”. Wigmore, when revising Greenleaf’s work (see note 453), appears to have adopted his predecessor’s ‘categories’ approach to the subject, which is essentially an “exclusive” one. The alternative, ‘inclusionary’, approach was evident in the work of American treatise writers such as Jones (*The Law of Evidence in Civil Cases* (1896), at 299-300) and Elliott (*A Treatise on the Law of Evidence* (1904-5), § 261, at 218), and in general it may be said that the more modern the treatise, the greater the likelihood that the approach adopted is the ‘inclusionary’ one. By 1933, Stone (note 437, at 998) was describing the ‘exclusionary’ approach as “spurious”. Most recently, Leonard (note 431, at § 4.3.1) observes that “. . . today, the uncharged misconduct rule is viewed as inclusionary in virtually every American jurisdiction”, although he laments (*ibid*) the fact that neither approach has resulted in “. . . the sort of broad, analytical look at the problem that would lead to the embrace of an overriding theory”.

The error of following blindly down the English road owed much to the fact that:

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. . . before the mid-point of the nineteenth century, most American treatises on criminal law and evidence were essentially English treatises with citations to American cases added in footnotes. . . in many cases, the text of the American treatises was identical to that of the English versions.

The shining exception to this process seems to have been the writing of Wigmore, which in turn succeeded the work of Greenleaf. Greenleaf's work was taken over by Wigmore in 1899, and it was perhaps out of academic respect for his literary predecessor that the latter, in that first volume, continued to categorise bad act evidence according to the *purposes for which*, and *the context in which*, it had been held to be admissible in past cases.

However, even in this first foray into the area,<sup>453</sup> Wigmore made reference to the “ordinary doctrine of chances”, which he developed into an alternative theory to both justify, and better regulate, the admission of propensity evidence. Wigmore's theory is considered in more detail towards the end of this chapter, and in Chapter 10. He was, however, to be largely ignored by the legislators who created the statutory regime which followed.

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<sup>452</sup> Leonard, note 431, at § 3.2. He cites, as examples of this process, the works of Phillips (*A Treatise on the Law of Evidence* (Dunlap ed, 1816) and Starkie (*A Practical Treatise on the Law of Evidence* (Metcalf ed., 1826). Later in that century, the same process may be observed in the American versions of Stephen (published in the USA by the American author Reynolds as *A Digest of the Law of Evidence as Established in the United States*, but heavily reliant on the sixth edition of Stephen's treatise of almost exactly the same name), while even the American author Thayer (*A Preliminary Treatise on Evidence at the Common Law*, 1898) was required to rely on English precedent when explaining (at 525) how the American law at that date “forbids the use of a person's general reputation or actual character, as a basis of inference to his own conduct”.

<sup>453</sup> Simon Greenleaf, *A Treatise on the Law of Evidence* (16<sup>th</sup> ed. John Henry Wigmore and Edward Avery Harriman rev. 1899), at 71-72.

It is, in a very important sense, dangerously misleading to think of the law, whether as formulated in *Makin*, or as it was to be laid down in Rule 404(b), as being two *separate* rules, the dominance of one over the other determining whether the outcome is either ‘inclusionary’ or ‘exclusionary’. There is, in effect, only *one* rule. It states that evidence may not be employed if it invites reasoning to guilt from character or propensity, and nothing else. To that rule there are *no exceptions*. In light of that, it is duplicitous to think of the existence of a *second* rule which permits the admission of such evidence for different purposes. Provided that it is relevant, evidence adduced to demonstrate, for example, “course of conduct”, is being admitted in accordance with the *one rule*, namely that it *does not* reason solely from character or propensity to guilt.

If more attention had been paid to the danger of admitting evidence whose only relevance is what was identified in *Boardman* as “forbidden reasoning”,<sup>454</sup> then there would have been no need, in the USA or anywhere else, for ‘categories’ of admission, and there would have been a correspondingly reduced risk of artful prosecutors disguising character reasoning evidence as something else. The greater the number of categories of admissibility, the greater the risk of abuse by prosecutors, and the greater the danger of the jury being allowed to employ the evidence for the prohibited reason. The question should not be “What *purpose* is this evidence being admitted for?”, but “What *line of reasoning* is the jury being invited to employ?”.

The ‘purpose’ approach was, however, too deeply established by case precedent, and too deeply embedded in the American legal psyche, not to have been perpetuated by the legislators when they finally set about codifying the law in this area.

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<sup>454</sup> Note 252.

## The Federal Rules

The ‘categories’ of admissibility which had come to be recognised by the courts became incorporated into the Federal Rules of Evidence in 1975. They had been anticipated by a “Model Code” provision in 1943,<sup>455</sup> and a “Uniform Rule”,<sup>456</sup> a decade later. The first of these had merely reaffirmed the inadmissibility of evidence which sought solely to encourage reasoning from character to guilt, while the second, after repeating the ban on such evidence, permitted the admission of bad act evidence in each of the categories which are now to be found in Federal Rule 404(b).<sup>457</sup> The last-named, therefore, reflects no change in approach since the middle years of the Twentieth Century, a full two decades before *Boardman*, which was not reflected in any subsequent amendments.

The relevant Rules, for the purpose of this thesis, are Rules 403 and 404(b). They provide as follows:

### Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.<sup>458</sup>

### Rule 404 (b)

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

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<sup>455</sup> Rule 311, heavily influenced by the writings of Stone (note 437).

<sup>456</sup> Rule 55. These Rules were intended for use by State legislators.

<sup>457</sup> The latest Uniform Rule in the series, produced in 1999, contains a Rule 404(b) which is identical in its permissible purposes for admission with its federal counterpart.

<sup>458</sup> This is clearly intended as a broad exclusionary rule, capable of being applied to *all* evidence which has the undesired effects specified. However, it suffers from the defects that (a) it is discretionary, and (b) it is for the accused to justify exclusion.

knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.<sup>459</sup>

Despite a technical amendment in 1987, and the insertion of the notice requirement in 1991, the Rules are the same today, in their application in criminal cases, as when they were first enacted. Rule 404(b) is described by Professor Cleary, the original Reporter to the Advisory Committee for the Federal Rules of Evidence,<sup>460</sup> as “. . . one of the most cited Rules in the Rules of Evidence”. This is despite the fact that technically, these Rules only apply in prosecutions for breaches of federal law, and trials for non-federal offences on military bases and Indian Reservations.

Leonard,<sup>461</sup> defines the overall effect of Rule 404(b) in terms very reminiscent of *Makin*, namely that:

The rule contains two basic principles. The first is that evidence of uncharged misconduct is not admissible when offered to prove conduct by means of a character inference. The second principle is that the court may admit evidence of uncharged misconduct when it is offered for other purposes.

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<sup>459</sup> This Rule has been substantially followed in all the State Evidence Codes, and in the case of some states (e.g. Alabama, Colorado, Indiana, West Virginia and Utah) the equivalent Rule is word-identical. Even in those States in which there are variations (predominantly regarding the notice requirement), the ‘categories’ approach has been followed, and the categories are the same. Interestingly, Hawaii seems to be unique among the States in including “*modus operandi*” within those categories. The Californian Rule also includes, within the permitted inclusion categories, evidence to rebut the claim of “honest and reasonable belief in consent” in sexual cases.

<sup>460</sup> *Federal Rules of Evidence* (2010-2011 Edition), Thomson Reuters, USA, p. 36. He was writing in 2010. Even earlier than that, it had been reported (Imwinkelried 1993, note 437, at 74) that “Federal Rule of Evidence 404(b) has produced more published appellate opinions than any other subsection of the Federal Rules”.

<sup>461</sup> Note 431, at § 4.1.



The combined effect of Rules 403 and 404(b), read together, is that a pre-trial assessment of the admissibility of an item of bad act evidence, and the “reasonable notice” requirement which precedes it, are both limited to the question of whether or not the evidence in question may be fitted within one of the categories of inclusion. The all-important issue of whether or not the prejudicial potential of the evidence exceeds its probative value can, it seems, be addressed only at trial, and only under Rule 403. By this means, admissibility is still determined by ‘category’, rather than by measuring probative value against potential prejudice. The danger of unfair prejudice must also, under Rule 403, be shown to “substantially” outweigh the probative value of the evidence. Put in reverse, if the probative value of the evidence is perceived to be great, then a considerable degree of potential “unfair prejudice” must be demonstrated before the evidence will be excluded.

In what is regarded as the leading case on the application of the two Rules, the inference was that both tests would be applied at the same time, which by default would be at trial. Thus, in *United States v Beechum*,<sup>462</sup> the Supreme Court explained that:

[The] Rule relating to admissibility of extrinsic offense evidence calls for essentially [a] two-step test; first, it must be determined that similar offense evidence is relevant to an issue other than the defendant's character, and second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet other requirements of [the] rule providing for weighing of probative value of evidence against danger of undue prejudice.

This still does not avoid the conceptual defect that “probative value” is not seen to be a direct factor in admissibility. Instead, the admissibility focus is on the *purpose* (that is, the *reason*) for the admission of the evidence, without any reference to the fact that the underlying logic for admissibility (i.e. the ‘key’ to it) is its *relevance* to the case

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<sup>462</sup> (1978) 582 F. 2d 898 (5<sup>th</sup> Cir.).

as a whole.<sup>463</sup> The important test is arguably not the *purpose* of admission at all, but rather the probative strength of the evidence in eliminating alternative hypotheses consistent with innocence.

Another weakness in the system emerged shortly after the 1975 enactment, and has never been addressed by subsequent amendments. This is that a literal reading of s 403 limits the duty to exclude evidence on the grounds of undue prejudiciality to jury trials; in *Gulf State Utils v Ecodyne Corp*,<sup>464</sup> the Supreme Court ruled that Rule 403 “. . . has no logical application in bench trials”. This seems to place what may be unwarranted faith in the ability of a trial judge not to be adversely affected by evidence revealing the allegedly ‘true nature’ of the person on trial before them alone.

Rules 403 and 404 are also supplemented by Rule 105, which requires “the court”, upon request by either party, to instruct the jury on the limited use to which bad act evidence may be put. If, for example, under Rule 404(b) it is admitted in order to prove “plan”, then the trial judge must direct the jury against its use in order to infer guilt from general character. There is, of course, no guarantee that the jury will even *understand* that distinction, let alone apply it.

Professor Cleary,<sup>465</sup> observes that the “reasonable notice” requirements of Rule 404(b) do not preclude the possibility of an admissibility ruling being made in advance

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<sup>463</sup> McCormick (*McCormick on Evidence*, 6<sup>th</sup> ed, 2006, student edition), § 188, at p. 133, confirms that “In ascertaining whether [character-type] evidence is admissible, the *purpose for which the evidence is offered* remains of the utmost importance” (emphasis added). Leonard (note 431, at § 3.4), expresses the same view of the approach which had hitherto been taken by the courts, which “[r]ather than asking exactly how the evidence was relevant on a non-character basis . . . tended to focus on the kind of case and on the broad purpose for which the evidence was offered”.

<sup>464</sup> (1981) 635 F.2d 517 (5<sup>th</sup> Cir.). This was clearly a civil case, but the principle laid down is equally applicable in criminal cases, given the broad application of Rule 403 and the lack of limitation in the ruling. See also *Schultz v Butcher* (1994) 24 F.3d 626 (4<sup>th</sup> Cir.)

<sup>465</sup> Note 460, at p. 37.

of the trial.<sup>466</sup> However, this does not prevent prejudicial evidence being admitted on a provisional basis, under yet another Rule.

**Rule 104(b)** provides that:

When the relevancy of evidence depends upon the fulfilment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfilment of the condition.

It is impossible to interpret this rule otherwise than as permitting the jury to hear prejudicial evidence which they may later be told to ignore.<sup>467</sup> Additional comment on this point would seem to be superfluous.<sup>468</sup>

As originally drafted, Rule 404(b) did not come with a notice requirement. This was inserted following a 1991 amendment, while leaving the remainder of the Rule unchanged. Given the fact that unfair surprise has long been regarded as one of the undesirable consequences of admitting bad act evidence,<sup>469</sup> this was perhaps a little overdue, but it does bring with it the possibility that the legal arguments for and against admission may be heard *in limine*, with all the corresponding benefits of not delaying the trial itself and allowing the accused to prepare for the *complete* prosecution case.

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<sup>466</sup> “in limine”, which is the American equivalent of a “pre-trial motion” or “interlocutory application” in other jurisdictions.

<sup>467</sup> This interpretation was confirmed by the Supreme Court in *Huddleston v United States* (1988) 485 U.S. 681, which advised courts beneath it that “Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. If the proponent has failed to meet this minimal standard of proof [defined elsewhere in the judgment as being on the balance of probabilities], the trial court must instruct the jury to disregard the evidence.”

<sup>468</sup> As Leonard so eloquently puts it (note 431, at § 4.5.1), “. . . a bell once rung cannot be unring”.

<sup>469</sup> Only some states (such as Alaska and Pennsylvania) have adopted similar, or near-identical, provisions. Others (such as Florida) have imposed a minimum number of days before trial for the issue of the notice, while others (such as Wyoming and Connecticut) have left it to their senior courts to introduce a notice requirement.

The wording of the notice requirement indicates two possible weaknesses in its operation. The first is that it is only activated by a request from the accused. While an accused will obviously know what they have lurking in their closet, they will not necessarily be aware of whether or not the prosecutor (a) knows of it, or (b) will seek to employ it. This may come as a nasty surprise at the opening of the trial, and may be aggravated by the second flaw in the wording of the Rule, namely that the trial judge may “excuse pretrial notice on good cause shown”. One wonders whether or not a “good cause” might be that the prosecution has allegedly only discovered, on the morning of trial, that the accused intends to oppose the proposed admission of the bad act evidence, of which they (the accused) have only just become aware.

One of the other advantages of a hearing *in limine* is the possibility that there remains a record of the grounds upon which the decision to admit or exclude the bad act evidence was made, and in particular the reasoning behind the application of the probity versus prejudice test required under Rule 403. This assumes, of course, that Rules 403 and 404(b) are considered at the same hearing, which is not clearly required by their wording. Be that as it may, the existence of a clear record makes matters easier for any later appeal court, but surprisingly few jurisdictions – not even the federal one – impose any statutory requirement on the trial judge to place the reasons for their findings on record. The failure to do so is not even regarded as a “reversible error”,<sup>470</sup> and it seems to be left to opposing counsel to ensure that a proper record is created.

Even if there is sufficient record available for an adequate review on appeal, the position adopted by the American appellate courts is that their role is not to replace the opinion of the trial judge, who is in the “. . . best position to engage in th[e] balancing

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<sup>470</sup> *United States v Bradshaw* (1982) 690 F. 2d 704, 708 (9<sup>th</sup> Cir.). The position is different in Washington; see *State v Smith* (1986) 725 P. 2d 951 (Wash.), at 953.

process”.<sup>471</sup> The stance adopted, by the Seventh Circuit of the Supreme Court,<sup>472</sup> encapsulates the position perfectly:

We will reverse a trial court’s admission of evidence under Rule 404(b) only upon a clear showing of abuse of discretion. Our role on review is not to second guess the results reached by the trial court. . . .

The task of any appeal court is not assisted by the diversity of situations in which, and purposes for which, bad act evidence may be offered. This has made it particularly difficult to assess whether or not the trial judge abused their discretion by admitting the evidence, most notably when assessing the ‘similarity’ of the challenged evidence to the criminal act alleged in the indictment. In the context of a disputed admission of *modus operandi* evidence, the New York Court of Appeals in *People v Mateo* observed that:<sup>473</sup>

Both defendant and the People . . . ask us to provide a calculus of “similarity” by which all future cases might be plotted. To do so, however, would ignore the relative nature and contextual considerations inherent in any analysis and application of the “similarity” element.

Whatever may have been the intentions of the legislators, Rule 404(b) has proved itself to be an evidential quagmire. By following the long-established practice of creating a general exclusionary ban, but then allowing ‘heads’, ‘gateways’ or ‘loopholes’ of admissibility, American legislators have perpetuated the worst aspects

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<sup>471</sup> *State v Fortin* (1999) 724 A. 2d 818 (N. J. Super. Ct. App. Div.), at 827.

<sup>472</sup> *United States v Connelly* (1989) 874 F. 2d 412 (7<sup>th</sup> Cir.).

<sup>473</sup> (1999) 690 N. Y. S. 2d 527 (N. Y.), at 530. The same was said to be true for *all* permissible heads of inclusion in *People v Golochowicz* (1982) 319 N. W. 2d 518 (Mich.). With respect, this is a comprehensive negation of responsibility by those courts to which one looks for judicial guidance. The very fact that each case is different makes it even more imperative that *guideline principles* be laid down which identify the factors which should govern admissibility in *every* case.

of the ‘categories’ regime which developed in England post-*Makin*, and have formalised it in legislative legerdemain which has echoes of the English *Criminal Justice Act 2003*.<sup>474</sup>

### **A recipe for prosecutorial abuse**

The subsequent case history of Rule 404(b) is a powerful indictment of any ‘categories’ approach to the admission of similar fact evidence. Like all rules which define admissibility by reference to ‘purpose’, it has fallen hostage to slick prosecutorial analogy reasoning and ‘liberal’ (i.e. pro-prosecution) judicial interpretation. Also, given that ‘admissibility’ has been allocated one Rule, and ‘prejudiciality’ another, there is a risk that the two will never be considered together.

If bad act evidence is erroneously admitted through one of the categories of Rule 404(b), and is then allowed to sway the jury into “forbidden” reasoning, the “unfair prejudice” caused by that admission may go unnoticed. It may be concluded on appeal that the evidence was admitted for a ‘proper’ purpose, for reasons no more persuasive than the fact that the evidence ‘ticked the box’.

Under Rule 403, the burden of proof appears to lie on the accused who seeks to have the evidence excluded. It is not for the prosecution to seek *inclusion* of the evidence because its probity “substantially outweighs” prejudice. It is for the defence to argue *exclusion* on the ground that its probative value is substantially outweighed by

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<sup>474</sup> See Chapter 4. Congress was warned of the complexity of what they had enacted by Judge Friendly (Court of Appeals for the Second Circuit of the Supreme Court) in his statement to the Congressional Hearing into “Reform of the Federal Criminal Laws” in 1973 (93d Cong. 251-2), when he observed of Rule 404(b) that “The rule seems to walk both sides of the street. It will provide a bountiful source of appeals and possible reversals”.

“the danger of unfair prejudice”. This seems to confirm that the rule is essentially an *inclusive* one which the defence must seek to override with an “unfair prejudice” argument. If, on a mere “preponderance”, the bad act evidence is more likely to facilitate unfair prejudice than is justified by its relevance, it is still apparently admissible.

The Court, in *Huddleston*,<sup>475</sup> cited Rule 105 as one which provides protection to an accused under the Federal Rules. That Rule requires a trial judge (but *only* if requested to do so by the defence) to issue a “limiting instruction” to a jury,<sup>476</sup> confining the use of bad act evidence to the purpose for which it was admitted. Not only does this beg the question of whether or not that reason for admissibility was a valid one, but it relies upon the jury following the instruction. After citing an impressive number of studies,<sup>477</sup> to support his argument, Leonard,<sup>478</sup> concludes that “. . . juries often are not able to ignore inadmissible evidence nor are they very good as using evidence only for its permissible purposes”.

Despite the confidence in the regime of the Federal Rules which it expressed in *Huddleston*, the Supreme Court has never seen fit to guide trial courts in what might constitute either “probity” or “unfair prejudice”, but has contented itself with the generalised observation that each case must be judged on its own facts, given that each case is “extremely fact-specific”.<sup>479</sup> Nor is any such guidance to be found in the Rules themselves.<sup>480</sup>

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<sup>475</sup> Note 467.

<sup>476</sup> This is the equivalent of a “propensity warning” in some jurisdictions, including Australia.

<sup>477</sup> Kalven and Zeisel (1966), *The American Jury*, 127-130, 177-180; Wissler and Saks, (note 38), at 47; Stanley Sue et. al., “Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma”, 3 J. Applied Soc. Psychol. 354 (Dec 1973); Diamond and Vidmar, “Jury Room Ruminations on Forbidden Topics”, (2001) 87 Va. L. Rev. 1857, at 1864-65.

<sup>478</sup> Note 431, § 4.5.1.

<sup>479</sup> Leonard, note 431, § 7.5.1.

<sup>480</sup> The Advisory Committee’s Note to Rule 403 (see *Federal Rules of Evidence*, note 60, at p.33) refers only to (a) consideration being given to a “limiting instruction” if the evidence is admitted, and (b) the need to consider the possible availability of other means of proof of the fact it is sought to demonstrate.

This absence of guidelines, and the stated policy of only reversing a decision to admit similar fact evidence if “abuse of discretion” can be demonstrated,<sup>481</sup> have combined to foster a regime which favours prosecutorial ‘boundary pushing’ and, ironically, an inability to rely on previous case-law. It is next to impossible, under U. S. law, to predict in advance just how “probative” any given item of evidence will be judged to be, or what nature or degree of “unfair prejudice” will serve to have it excluded.<sup>482</sup> Even then, it need only be “a danger” of unfair prejudice, requiring the trial judge to assess the apparent intelligence and gullibility of *the jury*. What might well, in the context of any given trial, unfairly prejudice one jury may have no adverse effect on another.

Nor can one predict which ‘purpose’ of admission will be the chosen one under Rule 404(b). The sheer number of possibilities has further sub-divided the case-law. There are also many precedents on record, for example, emphasising that the ‘similarity’ required between the act charged and the similar fact to be alleged will vary according to which head of admissibility is being employed.<sup>483</sup>

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<sup>481</sup> See *United States v Connelly*, note 472. The ‘contextual’ view of the evidence formed by the trial judge is always afforded considerable weight and respect in such appeals.

<sup>482</sup> As Leonard explains (note 431, at § 7.5.2), “. . . identification of relevant factors, though extremely important, can only provide a rough guide. The courts must decide the admissibility of the evidence in each case on its own merits”.

<sup>483</sup> See, for example *People v Gallego* (1990) 276 Cal. Repr. 679, 706 (the degree of similarity required for proof under the “intent” head is less than that required when establishing identity through “*modus operandi*”). In *United States v Hearst* (1977) 563 F. 2d 1331 (9<sup>th</sup> Cir.), it was held that evidence of a robbery which bore little factual resemblance to the robbery on the indictment could be employed against H to disprove her defence of duress.



### The liberality of judicial interpretation of Rule 404(b)

The net effect of Rule 404(b) has been described, by one observer,<sup>484</sup> as having been “to undercut the character rule”. Prosecutors have quickly learned which heads of admissibility are looked upon most favourably by their local judges, and have framed their submissions under whichever head seems more likely to offer a ‘softer’ test. They have been assisted by the sheer number, confusion and overlap of the potential heads of admissibility, and the growing indulgence of trial judges anxious not to be seen to be impeding ‘justice’, or to be accused of ‘being soft on criminals’.<sup>485</sup> This has even extended to excluding similar fact evidence from the operation of the Rule in the first place.

#### *Acts “intrinsic” to the offence on trial*

Under the *Criminal Evidence Act 2003* [E & W],<sup>486</sup> this type of evidence is described as being “to do with the facts of the case”. The justification for its admission is that without it, the prosecution could not give the jury “the full picture” of the events they have been called upon to assess. In some contexts it is more aptly categorised as *res gestae* evidence.

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<sup>484</sup> Leonard, note 431, at § 7.5.2.

<sup>485</sup> In many states, judges are popularly elected, a process which may encourage pro-prosecution rulings when state equivalents to Rule 404(b) are being considered.

<sup>486</sup> See note 358.

It has been long established under US law that “intrinsic” evidence is not regarded as falling within the category of ‘guilt by reasoning from character’. In *United States v Williams*,<sup>487</sup> it was held by the Supreme Court that:

“Other act” evidence is “intrinsic” when the evidence of the other act and the evidence of the crime charged are “inextricably intertwined” or both acts are part of a “single criminal episode” or the other acts were “necessary preliminaries” to the crime charged.

Only similar fact evidence which is deemed to be *extrinsic* to the case is required to qualify for admission for one of the purposes identified in Rule 404(b). But the distinction between “extrinsic” and “intrinsic” has proved hard to draw, and the case histories are full of borderline decisions, in most of which the decision went against the accused, and prejudicial evidence was admitted without regard to the Rule.<sup>488</sup> The courts have taken a broad view of what may be categorised as “intrinsic” to the offence on trial, although the Supreme Court has reconfirmed that such evidence must still pass the ‘probity/prejudice’ test of Rule 403.<sup>489</sup>

Leonard,<sup>490</sup> lists the bases on which “intrinsic” evidence has been admitted as including (1) a series of transactions which are the same as the one on trial;<sup>491</sup> (2)

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<sup>487</sup> (1992) 900 F. 2d 823 (5<sup>th</sup> Cir.). It was able to cite ample case authority, such as *United States v Torres* (1982), 685 F.2d 921 (5<sup>th</sup> Cir.) and *United States v Stovall* (1987) 825 F. 2d 817 (5<sup>th</sup> Cir.). See also *United States v Williams* (1990) 900 F. 2d 823 (5<sup>th</sup> Cir.).

<sup>488</sup> See, for example, *United States v Summers* (1998) 137 F. 3d 597 (8<sup>th</sup> Cir.), in which, at his trial for conspiring to supply drugs, the jury was allowed to learn of S’s supply of drugs to a prosecution witness ahead of the starting date of the alleged conspiracy, on the ground that it was part of the “factual setting of the crime in issue”. A similar ruling was handed down in *United States v Kennedy* (1994) 32 F. 3d 876 (4<sup>th</sup> Cir.).

<sup>489</sup> In *United States v Senffner* (2002) 280 F. 3d 755 (7<sup>th</sup> Cir.)

<sup>490</sup> Note 431, at § 5.2.

<sup>491</sup> See *United States v Swinton* (1996) 75 F. 3d 374 (8<sup>th</sup> Cir.). This procedural side-step has become increasingly noticeable in more recent cases involving ‘continuing’ offences such as drug trafficking or criminal conspiracies; see, for example, *United States v Badru* (1996) 97 F. 3d 1471 (D.C. Cir.) and *United States v Montgomery* (2004) 384 F. 3d (9<sup>th</sup> Cir.).

supplying the jury with the ‘context’ or ‘full story’ behind the offence on trial;<sup>492</sup> (3) identifying the offender or the reason why the offence was committed; (4) explaining the relationship between co-offenders;<sup>493</sup> and (5) demonstrating the offender’s knowledge of the crime’s commission.

The academic commentators appear to be divided on the advisability of allowing prejudicial evidence of this nature to be admitted without at least some sort of pre-trial testing of its true relevance for some reason *other than* its revelation of the accused’s true character.<sup>494</sup> But the possible political agenda which lies behind the tendency to exclude such evidence from the notional protection of Rule 404(b) has not gone unnoticed. For example:<sup>495</sup>

. . . since about the year 1980, evidence of uncharged crimes can be rendered admissible by the simple expedient of describing it as “inextricably intertwined” with evidence of the crime or crimes [alleged] in the indictment. It is difficult to view this

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<sup>492</sup> Cases coming within this category include *United States v Vretta* (1986) 790 F. 2d 651 (7<sup>th</sup> Cir.), *United States v Daly* (1992) 974 F. 2d 1215 (9<sup>th</sup> Cir.), and *United States v Murray* (1996) 89 F. 3d 459 (7<sup>th</sup> Cir.). Leonard comments (*ibid*) that “. . . the “completing the story” rationale is the most common situation in which courts hold that evidence is inextricably intertwined with or intrinsic to the charged acts”.

<sup>493</sup> *United States v Boyd* (1995) 53 F. 3d 631 (4<sup>th</sup> Cir.), *People v Leeson* (2009) 908 N.E. 2d 885 (N.Y.) and *Heywood v State* (2009) 208 P. 3d 71 (Wyo.).

<sup>494</sup> Compare, for example, Schuster, “Comment, Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence”, (1988) 42 U. Miami L. Rev. 947, 951, with Saltzburg et.al, *Federal Rules of Evidence Manual* (8<sup>th</sup> ed., 2002), § 404.02 [11].

<sup>495</sup> Hirsch, ““This New-Born Babe an Infant Hercules”: The Doctrine of “Inextricably Intertwined” Evidence in Florida’s Drug Wars”, (2000) 25 Nova L. Rev. 279-281. A fruitful area for the “intrinsic” evidence argument has been the defence of ‘entrapment’ in which the accused claims that they were pressured into committing a criminal act totally alien to their inclinations as the result of manipulation by a government agent such as an undercover police officer. The prior track record of the accused may then be said to be “inextricably entwined” with the prosecution allegation that the accused needed no undue persuasion to commit the offence, and was merely being monitored while pursuing their habitual course of criminal behaviour. This has been interpreted more than once by a court as *carte blanche* to inform the jury of the accused’s proven disposition in the past; see, e.g. *United States v Crump* (1991) 934 F. 2d 947 (8<sup>th</sup> Cir.), in which the Court (at 954) ruled that “. . . prior bad act evidence is admissible to show a defendant’s predisposition once the defendant has asserted the entrapment defence”. For other examples of this process, see *United States v Padilla* (1989) 869 F. 2d 372 (8<sup>th</sup> Cir.) and *United States v French* (1982) 683 F. 2d 1189 (8<sup>th</sup> Cir.).

doctrinal *volte face* as anything but result-oriented jurisprudence . . . [which] supports the admission of highly prejudicial and otherwise inadmissible other-crimes evidence. It enables the prosecution to circumvent the procedural obstacles set up by Rule 404(b) governing the admissibility of prior similar fact evidence. . . . It . . . [deprives] the defendant of one of the ancient and honourable premises of the Anglo-American system of justice: that the jury sits in judgment on the act a man is alleged to have done, not on the life a man is alleged to have led.

*“Crimes, wrongs or acts”*

Rule 404(b) applies only to similar fact evidence which may be said to reveal an accused’s “crimes, wrongs or acts”. This raises the question of whether or not the jury may be told of *other* previous events in a person’s life, or aspects of their lifestyle, which may cause that jury to be predisposed against them. For example, being a member of a motorcycle club, in itself, is morally “neutral”,<sup>496</sup> but may be misunderstood by some jurors, even if the club in question is not proscribed by legislation.

However, the approach of the American courts has consistently been that Rule 404(b) may not be invoked by the defence unless the evidence in question is being used to impugn their character.<sup>497</sup> The same view has also attracted academic support.<sup>498</sup>

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<sup>496</sup> This is the description employed by Leonard (note 431), at § 4.6.

<sup>497</sup> See, for example, *Huddleston v United States* (note 467). See also *United States v Rawle* (1988) 845 F. 2d (4<sup>th</sup> Cir.) 1244 at 1247, *United States v Terebecki* (1982) 682 F. 2d (11<sup>th</sup> Cir.) 1345 at 1348 and *United States v Beechum* (note 462), at 914.

<sup>498</sup> See, for example, Kaloyanides, “The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)”, (1992) 25 Loy. L. A. L. Rev. 1297 at 1313, who opines that the rule is only intended to apply to *bad* acts. See also Leonard (note 431, at § 4.6) that “. . . the act must be one that reflects negatively on the character of the actor”.

But this stance overlooks the possibility that behaviour which might be seen as “neutral” as to the accused’s character in one context may be held against them by a jury in another.<sup>499</sup> It is also almost impossible to predict in advance if a jury will react unfavourably to a particular piece of information regarding an accused, and employ irrational prejudice in reasoning that they should be convicted. It is not sufficient to rely, as some commentators have done,<sup>500</sup> on the belief that if the prior act is “neutral”, there is no risk of prejudice. Nor is it sufficient to point to Federal Rule 403, and assume that the “probity versus prejudice” test will take care of the situation. This relies on the opinion of the *trial judge* regarding the prejudiciality of the evidence, not the jury.

As the previous example of declaring bankruptcy illustrates, one’s “status” might also prove prejudicial to a jury.<sup>501</sup> The question of whether or not status falls within Rule 404(b) has never been answered judicially, but in Leonard’s opinion:<sup>502</sup>

. . . it is reasonable as a matter of policy to interpret the word [“act”] broadly as it appears in the uncharged misconduct rule, sweeping both neutral acts and evidence of status within the reach of the rule.

The problem is further exacerbated when what is disclosed to the jury is said to be “intrinsic” to the events on trial. Is the homophobic juror less likely to be influenced by the disclosure that the accused is homosexual in the context of a trial in which the charge is one of the robbery of a man he met in a ‘gay’ club earlier that evening, than if

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<sup>499</sup> For example, a person who has in the past declared themselves bankrupt would not be likely to be prejudiced by that status when facing a charge of assault, but it might count against them in a fraud case. However irrational such reasoning might be, it is a possibility which a trial judge should be alert to.

<sup>500</sup> These include Imwinkelreid, *Uncharged Misconduct Evidence* (1988) (hereafter “Imwinkelried 1988”), § 8.24.

<sup>501</sup> Examples of “status” in this context would include not only being an undischarged bankrupt, but also being unemployed, divorced, homosexual or drug-addicted. As Leonard (note 431, at § 4.6) puts it, “. . . status evidence almost always communicates something about an underlying act”.

<sup>502</sup> *Ibid.*

they are advised that the victim set out that evening to meet up with someone he had contacted through the pages of a ‘gay’ magazine? In the first example, the evidence of the accused’s presence in the gay club might well satisfy the “intrinsic” test, while in the second, hopefully it would not. However, in either context a homophobic juror might elect to record their prejudice with a conviction based on emotion rather than evidence.

### *The “kitchen sink” process*

Not only does Rule 404(b) contain a considerable number of potential ‘heads’ under which similar fact evidence might be admitted, but they have the potential to overlap, and to be somewhat ‘rubbery’ in definition. Appeal courts in the USA have also frequently justified, with hindsight, the admission of bad act evidence under *more than one head*, in a process described, by Leonard,<sup>503</sup> as a “kitchen sink approach to admissibility of uncharged misconduct evidence”. This same approach, at trial level, has resulted in prosecutors persuading trial judges to admit similar fact evidence under several heads, without analysing carefully its relevance under *any* of them. Once again, ‘ticking the box’ seems to be the name of the game.

For example, in *United States v Gamble*,<sup>504</sup> G and others were on trial for an alleged conspiracy to transport stolen trucks interstate, and evidence of a prior burglary by one accused, and a prior car theft by another (neither of which were remotely

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<sup>503</sup> Note 431, at § 10.4.

<sup>504</sup> (1976) 541 F.2d 873 (10<sup>th</sup> Cir.). See also *United States v Hall* (1996) 93 F. 3d 1337 (7<sup>th</sup> Cir.), in which H was convicted of the kidnapping, for sexual purposes, of a 15 year old girl, following the admission of evidence of his “habit” of stalking teenage girls. This was said (at 1346) to be evidence of “intent, preparation or plan”, even though there was no evidence of his having stalked the girl he was alleged to have eventually kidnapped, and it is difficult to see how stalking other girls might have “prepared” him for the eventual kidnap. It is not difficult to imagine what use the jury made of this uncharged evidence; it was the clearest possible example of a man being convicted on the basis of his “known character”, and little else.

connected to the offences on trial) was admitted, and later upheld by the appeal court on the ground that:<sup>505</sup>

. . . .this evidence was admissible to show “. . . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” . . . Such evidence is particularly relevant in a conspiracy case.

Although *all* the heads of admissibility identified under Rule 404(b) are open to abuse, and susceptible to overlap,<sup>506</sup> the extent of that abuse and overlap in practice is best illustrated by reference to three of those heads, namely “intent”, “opportunity” and “plan”.

### Intent

The head of “intent” is perhaps the one most widely employed by prosecution judges searching for a justification for admitting evidence of the accused’s unflattering history or previous lifestyle.<sup>507</sup> Over the years, it has been deemed appropriate to argue towards “intent” from other heads of admissibility specified in

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<sup>505</sup> At 877-8.

<sup>506</sup> Consider, for example, the facts in *People v Archerd* (1970) 477 P. 2d 421 (Cal.). A was on trial for murder by poisoning, and her knowledge of the nature of the substance employed was said to be proved by evidence of three similar prior deaths linked to her; it was also said to prove identity, intent, malice, premeditation, motive and *modus operandi*. Were such a case to arise today under Rule 404(b), the prosecution would obviously be spoiled for choice.

<sup>507</sup> See, for example, *United States v Haukaas*, (1999) 172 F. 3d 542 (8<sup>th</sup> Cir.), in which H’s defence to an assault with a weapon charge was that he was too intoxicated to have formed the necessary intent. The prosecution was allowed to adduce, in rebuttal, evidence of an attack on his girlfriend two years previously, and this decision was upheld on appeal without considering the similarities and dissimilarities which might have existed between those two incidents. It is difficult to escape the conclusion that the real rationale was that a man who has proved himself capable of intentionally committing one violent assault is more likely to have done so on a later occasion. See also *United States v Hearst* (note 483).

Rule 404(b), such as absence of “mistake” or “accident”,<sup>508</sup> “knowledge”, “motive”, “plan” and “preparation”. The existence of so many overlapping categories invites this confusion, and has led to a situation in which, in the USA:

. . . there is a wide divergence of opinion among courts and commentators about the requirements for admission of uncharged misconduct evidence to prove intent.<sup>509</sup>

Additionally, as Reed points out:<sup>510</sup>

Intent is an element of almost every crime. If evidence of other crimes could be admitted in any case in which intent was an element of crime, this exception alone would have emasculated the general rule.

Some trial judges have even allowed bad act evidence to be admitted in order to prove intent when it was not even a material issue in the case, as for example when the accused denied even performing the act.<sup>511</sup> Some federal courts have regarded intent as a material issue whenever an accused simply pleads not guilty.<sup>512</sup> Similar fact evidence has even been admitted to prove intent when the accused has offered to *admit* it.<sup>513</sup>

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<sup>508</sup> A good example of proving criminal intent via the “lack of accident” route was *United States v Perkins* (1996) 94 F. 3d 429 (8<sup>th</sup> Cir.). P’s denial that he knew the substance found in his apartment was crack cocaine was rebutted by evidence of his guilty plea to possessing it six months earlier. The knowledge he had acquired by this means was said (at 434-5) to be “. . . probative of his knowing possession . . . at the time charged in the Indictment. *Additionally, the prior offence was admissible to show intent*” (emphasis added)

<sup>509</sup> Leonard, note 431, at § 7.1.

<sup>510</sup> “The Development of the Propensity Rule in Federal Criminal Causes 1840-1975”, (1982) 51 U. Cin. L. Rev. 299, at 307.

<sup>511</sup> This admission was upheld on appeal in *State v Sweeney* (2000) 999 P. 2d 296 (Mont.).

<sup>512</sup> See, for example, *United States v Misher* (1996) 99 F. 3d 664 (5<sup>th</sup> Cir.) and *United States v Shedlock* (1995) 62 F. 3d 214 (8<sup>th</sup> Cir.).

<sup>513</sup> *United States v Ponce* (1993), 8 F. 3d 989 (5<sup>th</sup> Cir.), relying on a broader principle laid down in *Old Chief v United States* (1997) 519 U. S. 172.



Prosecutors have also succeeded in using the “intent” head in order to circumvent the printed word of Rule 404(b). A strict reading of s 404(b) suggests that it was intended to encompass only evidence relating to *conduct*. The first half of the subsection restricts the ‘character ban’ to evidence showing ‘*action* in conformity with’ character, and a possible glib argument by a prosecutor would be to the effect that “The government is entitled to prove the accused’s character if such proof is limited to questions about their mental *intent*, and not their *actions*”.

Such an argument won the day in *United States v Weddell*,<sup>514</sup> in which it was held that “Where intent is an element of the crime charged, evidence of other acts tending to establish that element is generally admissible”. Imwrinkelried argues that:<sup>515</sup>

This doctrine is a dangerous one threatening to emasculate the character evidence prohibition . . . . Intent is an element of every true crime. Accepting the premise that the character evidence prohibition is applicable to evidence offered to establish *mens rea*, the courts could rationalize admitting evidence of any similar uncharged crimes as a matter of course.

### Opportunity

The same process of abuse and what might be termed ‘category conflation’ has occurred under the “opportunity” head. Even if it is proved that the accused *did* have the opportunity to commit the crime, this does not necessarily distinguish them from

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<sup>514</sup> (1989) 890 F. 3d, (8<sup>th</sup> Cir.)106, at 107-8. This line of argument seems to have originated in respect of California Evidence Code Sec. 1101(b), which is equivalent to, and was the model for, Rule 404(b). In *People v Bittaker* (1989) 48 Cal. 3d 1046, at 1096, the California Supreme Court determined that Rule 1101(b) applied only “. . . when offered to prove [the accused’s] *conduct* on a specified occasion . . . rather than [their] conduct on any particular occasion” (original emphasis).

<sup>515</sup> “The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrine Which Threatens to Engulf the Character Evidence Prohibition”, (1990) 51 Ohio State L. J. at 575 (hereafter “Imwrinkelried 1990”), at 579-80.

many others with the same opportunity. But if, in the process of proving opportunity, the prosecutor is allowed to advise the jury of previous bad acts by the accused, the odds narrow in favour of the accused as the perpetrator, particularly if the circumstances of that previous bad act are similar to the act alleged on the indictment.

In *Straffen*,<sup>516</sup> for example, the fact that S had been committed to a mental institution following the previous, almost identical, murder of two small girls, needed only to be ‘topped off’ with evidence that he had escaped from that institution a few hours before the murder alleged in the indictment, and therefore had the ‘opportunity’ to commit it. Under Rule 404(b), a similar scenario could be approached from the reverse direction, allowing the jury to learn of the compelling similarity between the two crimes on the notional basis that it was relevant solely to “opportunity”. In such a case, the outcome would probably not give cause for concern, but not all uses of this head of Rule 404(b) have been so innocuous.<sup>517</sup>

In practice, over the years, “opportunity” seems to have leaked across into “capacity”, and evidence has become admissible to prove an accused’s capacity or ability to have performed the act alleged, even though it is not one of the specified heads of admissibility under Rule 404(b). This is most frequently allowed in order to rebut a defence that the accused did *not* have such a capacity.<sup>518</sup>

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<sup>516</sup> Note 226.

<sup>517</sup> See, for example, *United States v Stover* (1975) 565 F. 2d 1010 (2<sup>nd</sup> Cir.), in which the fact that S *could* have stolen a car was established by evidence that he had just escaped from a nearby prison.

<sup>518</sup> In *People v Manson* (1976) 132 Cal. Rptr. 265 ((Ct. App.)), for example, M, a cult leader, was on trial for ordering a series of murders by his cult followers. When he denied his capacity to exert that much influence over his “family”, evidence was led of his ability to persuade family members to engage in bizarre sexual orgies. This was upheld on appeal, on the basis that “. . . if Manson could induce bizarre sexual activities, he could induce homicidal conduct. While the evidence is less than flattering, its prejudicial character is outweighed by its evidentiary value showing Manson’s involvement in the murders”.

Such a ‘capacity’ obviously provides one with ‘opportunity’, and on more than one occasion has been extended into ‘plan’.<sup>519</sup>

### Plan

If an alleged criminal “plan” is defined broadly enough by a prosecutor, it can be made to connect two or more vastly different types of similar criminal behaviour.<sup>520</sup> The logic of ‘relevance’ is then replaced by the irrationality of character reasoning.<sup>521</sup> The same is true of “preparation”, which once again can be made to overlap with other exceptions to the general rule. The accused’s prior involvement in some action which may be linked to the resulting crime may indicate not just the accused’s preparation, but also their plan,<sup>522</sup> their intent, their opportunity, and their motive.

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<sup>519</sup> In *United States v Provenzano* (1980) 620 F. 2d 985 (3<sup>rd</sup> Cir.), P’s ‘ability’ to control the union members under his leadership, and his previous extortionate threats to their employers, were said to amount to evidence of his “plan” to extort money from them on the occasions specified on the indictment, via his “opportunity” to do so. In *United States v Doherty* (1987) 675 F. Supp. 714 (D. Mass.), D’s “ability” to obtain and sell advance copies of examination papers was established by evidence that he had previously done the same with similar papers. This was said (at 715) to be admissible to prove “intent, plans, preparations and manner of doing so”. See also *United States v DeLuna* (1985) 763 F. 2d 897 (8<sup>th</sup> Cir.).

<sup>520</sup> The overt argument that the offence on trial and the contested offence(s) are part of the same overall “plan” is successful in having the evidence admitted, but the lack of striking similarity between the offences is more likely to tempt the jury to reason that since the accused is a confirmed criminal, he is therefore more likely to be guilty on the occasion on trial.

<sup>521</sup> For example, in *United States v Walls* (1978) 577 F.2d 690 (9<sup>th</sup> Cir.), W was convicted of fraudulently acquiring a loan on the security of mineral rights which he did not own, following the admission of evidence of his having previously defaulted on other, different, loans in the past. The justification for the admission of this evidence was said to be that his “system or course of conduct” rebutted any suggestion that the mineral rights loan agreement was conducted in good faith. In reality, of course, the jury were being asked, in effect, “Would you have loaned money against those mineral rights had you known of W’s past record?” See also *State v Wright* (1999) 593 N.W. 2d 792 (S.D.) (W’s claim of ‘justification’ for physically beating his son in the belief that he had set fire to the family home was rebutted by evidence that he had similarly beaten the boy in the past for relatively minor reasons, which was admitted to show W’s “plan or design” to inflict excessive violence on his son regardless of the alleged justification).

<sup>522</sup> Wigmore (*Evidence in Trials at Common Law*, 1904, hereafter “Wigmore 1”), at § 238, in fact included ‘preparation’ within his definition of “plan”. Not even the latest edition of *McCormick* (note 463) lists “preparation” as a separate head of admissibility; instead, at § 190, it is subsumed within “plan”.

The relevance – and logical admissibility – of such evidence is obvious when the prior behaviour and the alleged crime are linked chronologically in a ‘chain of events’.<sup>523</sup> In such scenarios, the overlap with “opportunity” is obvious. But it is not always so straightforward.<sup>524</sup>

### **“Let’s get tough on sex offenders”**

The marked tendency of those in judicial authority to allow considerable latitude to prosecutors searching for a ‘way in’ for their prejudicial evidence has been more than matched by the legislators. As had occurred in England, public policy considerations – in the form of a public demand for increased convictions – led in the USA to a change in judicial approach to the rules of admissibility of bad act evidence in sex offence cases, including those involving children. Its blatant agenda was to bend the protective provisions afforded to an accused by Federal Rules 403 and 404(b), and allow juries in sexual offence cases to learn of the accused’s previous sexual misdeeds in the almost certain knowledge that they would then convict him.<sup>525</sup> This was reflected in legislative changes at the federal level, to give official sanction to what had been happening in practice for years.

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<sup>523</sup> A clear example of this fact scenario is provided by *Lewis v United States* (1985) 771 F. 2d 454 (10<sup>th</sup> Cir.), in which L was charged with a burglary which had been committed with the aid of a specific cutting tool, and evidence was adduced of his theft, the same evening, of just such a tool. There would be little risk of the jury reasoning, in such a case, “He has been proved to be a thief, therefore he is probably a burglar”. Instead, the persuasive link between the tool required for the task, and the accused’s possession of it, will command their attention far more; the argument goes that “the man who has the correct tool for the job has the “opportunity” to perform it”. Likewise, in *United States v Hill* (1990) 898 F. 2d 72 (7<sup>th</sup> Cir.), H’s involvement in a conspiracy to grow marijuana was proved partly by his proven possession of the necessary seeds during a prior arrest. See also *Commonwealth v Choate* (1870) 105 Mass. 451 (Mass.).

<sup>524</sup> See, for example, how “plan” was employed as one of eight possible heads of admissibility under Rule 404(b) in *United States v Gamble* (Note 504).

<sup>525</sup> I have reverted to gender specific terminology in light of the fact that the vast majority of accused in sexual cases are male.

The notional justification for such a stance is that, given the nature of such crimes, there is usually only one witness to them (the victim), they often occur without any circumstantial corroboration such as physical evidence, and they are often prosecuted long after the event. It therefore comes down to a credibility contest between accused and victim, and the only supporting evidence which may be available to the prosecutor is the fact that the accused has done it before.

When he has done it before to *another* victim, it may of course be possible to make the additional misconduct evidence available to the jury using one of the existing inclusionary heads of Rule 404(b), such as “motive”.<sup>526</sup> But when the similar fact evidence is that the accused has done the same thing before to the *same* victim, then the real reason for its admission would seem to be to boost the credibility of the victim over that of the accused. The logical counter-argument – that a so-called victim who is prepared to lie about one incident will have little difficulty in lying about others – seems to have been lost in the witch-hunt against sex offenders. Even when the prior offence is a matter of public record (for example, in the form of a previous conviction), the accused is too easy a target for a malevolently-disposed victim seeking further revenge.

When stretching the boundaries in order to admit the evidence under these existing heads, the courts left observers in little doubt of the true rationale for admission. For example, in *People v Leonard*,<sup>527</sup> a stepdaughter alleging aggravated incest was allowed to testify to a whole series of incidents of sexual abuse against her going back

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<sup>526</sup> See, for example, *State v Merida* (2008) 960 A. 2d 228 (R.I.), in which evidence of M’s misdeeds against his niece was admitted on his trial for similar offences against his granddaughter, in order to prove “motive”, “intent” and “plan”. See also *United States v Gano* (1977) 560 F. 2d 990 (10<sup>th</sup> Cir.), in which the challenged evidence was admitted to prove “motive”, “preparation”, “plan” and state of mind (designated as “knowledge”).

<sup>527</sup> (1993) 872 P. 2d 1325 (Colo. Ct. App.), at 1328. For a similar decision, see *Veloz v State* (1984) 666 S. W. 2d 581 (Tex. App.), at 582. In *Adrian v People* (1989) 770 P. 2d 1243 (Colo.), at 1246, the heads of admission were said to be “modus operandi and motive”

for several years,<sup>528</sup> in the face of L's denial that the incident on trial had occurred. On appeal, it was held that the evidence had been rightly admitted:

. . . to demonstrate that it was more probable than not that the defendant had a motive to commit yet another assault, *and thus to demonstrate that the victim's testimony was not fabricated.* [emphasis added]

In *People v Barney*,<sup>529</sup> the bad act evidence was admitted under the *modus operandi* head. The Court, while acknowledging that such reasoning is normally applied to proof of the identity of the perpetrator (which in this case was clearly not in doubt), added that it:<sup>530</sup>

. . . may also support the credibility of a witness in a sex crime case . . . by corroborating the details peculiar to the offences.

As Leonard points out,<sup>531</sup> the admission of evidence in this way proceeded more from 'propensity reasoning' than the logic underlying any of the notional heads under which it was more properly admitted. It therefore, prior to 1995, contravened Rule 404(b), in that it was being admitted to show "action in conformity" with the accused's disposition as demonstrated by other acts on his part ("Once a paedophile, always a paedophile"). Some courts were as bold as to say so.

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<sup>528</sup> Although these incidents were not identical to that alleged on the indictment, the Court of Appeal opined that they possessed "sufficient similarity" because they involved the same parties, occurred in private, and involved express or implied intimidation. It is difficult to conceive of a series of sexual offences which would *not* fit that broad description.

<sup>529</sup> (1983) 192 Cal. Rptr. 172 (Ct. App.). The victims in this case were a daughter and a granddaughter, both when minors, and the similar fact evidence consisted of additional uncharged offences against each of them. Curiously, Leonard (note 431, at § 8.5.3) seems to object to the application of *modus operandi* logic to what is essentially corroboration of the testimony of the victim, but raises no such objection to the use of "motive" logic for the same purpose in *Leonard*.

<sup>530</sup> At 176.

<sup>531</sup> *Ibid.*

In *Butler v State*,<sup>532</sup> for example, the Arkansas Court of Appeal proclaimed that:

This court has long recognised a “paedophile exception” to Rule 404(b). The rationale for this exception is that such evidence helps to prove the depraved sexual instinct of the accused . . . [The court] consistently considered similarities in age and gender of victims to be demonstrative of a depraved sexual instinct, such that the paedophile exception is applicable.

In 1994, with effect from 1995, federal legislators gave statutory legitimacy, at the federal level, to what the state courts had been allowing in practice, and enacted Rules 413 and 414. They provide as follows:

**Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

**Rule 414. Evidence of Similar Crimes in Child Molestation Cases**

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<sup>532</sup> (2010) WL 2132266 (Ark. May 27).

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

The overtly political origins of these two Rules are well documented.<sup>533</sup> The outgoing Bush Administration demonstrated its willingness to 'get tough' on sex offenders in precisely the same way, and at approximately the same time, as their counterparts in Britain were beginning to roll the ball that became the *Criminal Justice Act 2003* (E & W). The grandstanding of the Republic majority in Congress is typified by this address by Senator Dole:<sup>534</sup>

[T]oo often, crucial evidentiary information is thrown out at trial because of technical evidentiary rulings. . . . [I]f we are really going to get tough, and if we are really going to try to make certain that justice is provided for the victim . . . [I] think we ought to look seriously at [ Rules 413-5].

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<sup>533</sup> Ellis, "The Politics Behind Federal Rules of Evidence 413, 414 and 415" (1998), 38 Santa Clara L. Rev. 961. Public sentiment against sex offenders hardened following the widely reported trials for rape of high profile identities William Kennedy Smith (a Kennedy cousin) and the boxer Mike Tyson, at the same time that career appointments of females increased in many areas of influence such as commerce, the legal profession, the armed forces and politics.

<sup>534</sup> 139 Cong. Rec. S15,072-77 (daily ed. Nov. 4, 1998). He had earlier (137 Cong. Rec. S4927 (daily ed. Apr. 24, 1991)) raised the prospect that "concealing [the bad acts of the accused] from the jury often carries a grave risk that such a criminal will be turned loose to claim other victims". Representative Susan Molinari (140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) referred to ". . . a triumph. . . for the women who will not be raped and the children who will not be molested because we have strengthened the . . . tools. . . for bringing the perpetrators of these atrocious crimes to justice".



It is not obvious why the drafters of these amendments saw fit to divide the legislation into two separate provisions, given that they are word identical except in relation to the type of offence covered by each Rule. This division does have the effect, however, that the types of evidence thereby admitted under one Rule will not be admissible under the other. For example, a man facing a charge of child molestation will not be confronted by evidence of his previous rape of an adult victim. To this extent, the logical irrelevance of other bad sexual acts in proof of alleged new ones is acknowledged; otherwise, the decision to enact these rules can only be regarded as based upon public policy rather than any recognition of either logic or justice.

Rules 413-5 certainly did not meet with approval from practising lawyers, judicial officers or academic commentators. The most obvious reason for this was best summed up by Duane:<sup>535</sup>

It is self-evident that allowing juries to learn of a defendant's prior criminal history . . . will increase the chances of convicting all those accused . . . who have been convicted (or at least accused) of sexual offences in the past – regardless of whether those defendants are guilty or innocent.

For this reason, if for no other, Rules 413-5 experienced a turbulent passage into law. It is reported by Cleary that:<sup>536</sup>

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<sup>535</sup> “The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea”, (1994) 157 F. R. D. 95, at 107. For the counter-argument that juries do not fall for that shallow logic, see Melilli, “The Character Evidence Rule Revisited”, (1998) *BYU L. Rev.* 1547, at 1606. Several states already had Rules which permitted evidence to be admitted from a defendant's past which disclosed his “depraved sexual instinct”, or “lustful disposition”, but “. . . the influence of the Federal Rules is so persuasive that [their] adoption is of vital importance” (Orenstein, “No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials” (1997) 49 *Hastings L. J.* 633, n.97.).

<sup>536</sup> Note 460, at p.308. He further records that the same objections were raised by the Federal Advisory Committee, the Standing Committee on Rules of Practice and Procedure and the Judicial Conference of the United States. Clearly, those who knew most about the law warned against the amendments, but the politicians won the day.

The overwhelming majority of judges, lawyers, law professors and legal organisations who responded to the Federal Advisory Committee's call for public response opposed the enactment of Rules 413 through 415 without equivocation.<sup>537</sup> The principle objections expressed were twofold. First, the rules would permit the admission of unfairly prejudicial evidence by focusing on convicting a criminal defendant for what the defendant **is** rather than what the defendant **has done**.<sup>538</sup> (original emphasis)

This robust opposition by those best placed to appreciate the legal ramifications of what was being proposed, as opposed to its short-term popularity with the electorate, created considerable procedural difficulty for its proponents. The proposals had been either rejected by both the Supreme Courts Advisory Committees and the Judicial Conference of the United States, or subjected to proposed amendments which would have removed the automatic right of the prosecution to have the similar fact evidence admitted. The Rules themselves were inserted into a "Violent Crime and Law Enforcement Bill" which Rep. Susan Molinari and others threatened to block unless and until what are now Rules 413-5 were included. Because of the perceived political need for the Bill to be passed, the Rules were enacted.<sup>539</sup>

The Rules did not even find favour with those who might have been expected to most welcome them, namely the feminist scholars.<sup>540</sup> The feminists found support from

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<sup>537</sup> Rule 415 allows evidence of other bad sexual acts to be admitted in *civil* actions arising from sexual assault or child molestation.

<sup>538</sup> The second ground of objection was in relation to perceived problems in drafting.

<sup>539</sup> For further detail on the procedure summarised above, see Eads et.al, "Getting It Right: The Trial of Sexual Assault and Child Molestation Cases under Federal Rules of Evidence 413-415, (2000) 18 Behav. Sci. Law, 169, at 179-80.

<sup>540</sup> Their complaint, typified by Orenstein (note 535), was that the broad-axe approach adopted by the legislators tended to perpetuate "rape myths" which suggest that rapists belong to "a small class of depraved criminals" (*ibid*, p. 692) who can be identified by their past misdeeds, and who fall into a minority. Orenstein asserts that the fact that someone has raped before is not necessarily probative of the fact that they raped on the occasion under investigation, while the real-life rapist is often a nice, clean-cut college type whom one would never suspect. She also anticipated that when jurors became familiar with the exception contained within Rules 413-5, there would be a "halo effect" which might lead to acquittals unless the accused conformed to the mythical stereotype, and instead had only one or two 'priors' for sexual offences. She concedes, however (*ibid*, p. 695), that "... the argument in favour of

the behavioural scientists, one group of whom,<sup>541</sup> first of all point out that the combined effect of Rules 403, 413-5 is that the burden of proof is placed upon the accused to persuade the trial judge that the prejudicial effect on the jury of being told of his previous bad acts “substantially outweighs” any probative value it may have in the prosecution case. They then go on to emphasise the need for the trial judge, when assessing probative value, to have regard to “objective data gleaned from empirical studies on recidivism”.<sup>542</sup>

Specifically, they challenge the assumption that one can assess the likelihood of a person having offended on the occasion on trial from the fact that he has offended in the past. This is not the same thing as *predicting* re-offending in the *future*, which is what most recidivism studies undertake. Finally, given that “sexual crimes are idiosyncratic”,<sup>543</sup> they argue that similarity of *modus operandi* is a far better indicator of guilt of a new offence based on previous behaviour. Put another way, the old Rule 404(b) was a better regime under which to handle allegations of prior bad acts in relation to alleged new sex offences, and Rules 413-5 were little more than political grandstanding.

Subsection (c) of each Rule at least requires the trial judge to balance probity against prejudice under Rule 403, but given the case-law which preceded these amendments it is unlikely that a person accused of, say, child molestation would receive any sympathetic consideration from a trial judge to whom defence counsel complains that the admission of the contested evidence will all but guarantee the conviction of his client. Nor would such a judge be likely to decline to admit it, or rule “lack of good

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the probative value of prior similar crimes is stronger in cases of child molestation, where there is believed to be a higher recidivism rate for perpetrators”.

<sup>541</sup> Eads, et.al, note 539, at 182.

<sup>542</sup> *Ibid*, at 183. At 185, they warn that “. . . expert prediction of future violence based on clinical impression or logical intuition has a poor track record . . . the actuarial (empirically based) method . . . significantly outperforms the clinical method of judgment”. They also observe (at 187) that *generalised* statistics regarding recidivism among survey *groups* are no reliable indicator of future offending by *individuals*, given the arguable effect of “situational” variables.

<sup>543</sup> *Ibid*, at 188.

cause”, if the prosecutor does not give the fifteen day notice to which the accused is officially entitled.<sup>544</sup>

These Rules are of course federal, and do not cover state proceedings in state courts, where most sexual offences are likely to be tried.<sup>545</sup> It is therefore puzzling that, with the exception of California,<sup>546</sup> the states did not respond with mirror legislation of their own, as they did with Rule 404(b). The suspicion that, for political reasons, the state legislators did not want to ‘go public’ on what was already happening in practice is deepened when one reads of the reaction of those who responded to the call by the Federal Advisory Committee for feedback on their draft Rules 413 and 414 (see above).

Only when seeking to bolster their case for the enactment of Rules 413-5 did the United States Department of Justice fall back on a line of argument which may have been born of desperation, but which coincidentally supplied the most logical justification for the admission of bad act evidence in *any* case, not just those involving sexual offences. In what amounted to an endorsement of a ‘doctrine of chances’ approach, in its analysis of the proposed new Rules, the Department argued that:<sup>547</sup>

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<sup>544</sup> Academics had long complained of the increasing tendency of the courts to interpret Rule 404(b) and its state equivalents liberally in favour of the prosecution in sexual offences cases. See, for example, Mendez and Imwinkelried, “People v Ewoldt: The California Supreme Court’s About-Face on the Plan Theory for Admitting Evidence of an Accused’s Uncharged Misconduct”, (1995) 28 Loy. L. A. L. Rev. 473. To that extent, nothing new was being proposed, but the legislators clearly felt obliged to create the impression that it was.

<sup>545</sup> N. B. that the cases cited above were all heard in state courts, under state legislation.

<sup>546</sup> Cal. Ev. Code § 1108, which contains similar provisions to Federal Rules 413 and 414, but does not distinguish between the two broad types of offence, and covers “sexual offenses” generally.

<sup>547</sup> *Congressional Record*, vol. 137, no. 43, at § 3212. The argument of course overlooks the facts (a) that the greatest risk of a “false accusation” may well come from police rounding up “the usual suspects”, and (b) that the lack of coincidence of “multiple false accusations” only exists if one can eliminate collusion between complainants. It also only deals with one type of sex offence trial; there is no ‘coincidence value’ in one complainant testifying to a long list of “uncharged acts” by the same accused against her.

It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the very same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different women.

Speight<sup>548</sup> picks up on the more cynical justification for Rules 413-5, namely that this type of evidence had been admitted in the past by means of the abuse of Rule 404(b), and comments that:

The fact that there are “back door” possibilities for introducing what would otherwise be considered character evidence is an argument for careful scrutiny of those uses of the evidence. It is not a principled argument for opening the front door as well.

### **Conclusion – there is a better way to do this**

By perpetuating a ‘categories’ approach, American law has missed the opportunity to develop broad guideline principles to govern the admission of *all* forms of propensity evidence. This has not gone unnoticed in academic circles. Three decades ago, Kuhns observed that:<sup>549</sup>

. . . . the admissibility of specific acts evidence depends on a careful balancing of probative value against the concerns with prejudice, time consumption, and distraction of the fact-finder.

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<sup>548</sup> “Hard Cases Make Bad Law: *Commonwealth v Adjutant* And Evidence of the Deceased’s Propensity for Violence in Self-defence cases in Massachusetts”, (2006) 86 Boston University L. R. 793, at 805. The facts of *Adjutant* are not relevant to this thesis.

<sup>549</sup> “The Propensity to Misunderstand the Character of Specific Acts Evidence”, (1981) 66 Iowa L. Rev. 777, at 803-4.

With respect, while not novel, this suggestion has great merit. Evidence which is so relevant to the decision which the court has to make demands its *own* admission, *whatever* label is affixed to it. If, in the process, it also reveals that the accused is by nature a bad person, this should be of no concern, since the jury will not convict them from that knowledge alone. They will, instead, convict them because *the facts demand that they do so*. Those facts may well reveal the accused's previous history in a bad light, but in the overall context of *all* the facts in the case, this in itself will carry little weight with the jury.

What *will* carry weight will be the obvious relevance which the previous acts of the accused have to the new facts alleged against them, and any defence raised by them. The jury did not convict the Makins after concluding they had 'fostered' and killed twelve more babies. They were convicted because the very presence of the additional corpses rendered infinitesimal the possibility that the child named on the indictment died by accident.

Leonard,<sup>550</sup> thirty years on, is equally dismissive of the treatment of bad act evidence under USA law. He complains that:

. . . . none of the categorical rules capture fully the principles and factors that should guide the courts in deciding when to admit and when to exclude uncharged misconduct evidence. . . . labels alone can never be a valid substitute for analysis of the reasoning behind them and their application to the facts at hand.

Ironically, those "principles and factors" had already been identified, at the end of the Nineteenth Century, by one of America's most revered legal academics, John

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<sup>550</sup> Note 431, at § 8.5.3 and 10.6.

Henry Wigmore. When he was writing for himself for the first time,<sup>551</sup> Wigmore was able to expand upon his basic observation,<sup>552</sup> that “. . . similar results do not usually recur through abnormal causes” in order to generate what Leonard describes as “. . . a major advance in thinking about the subject”.<sup>553</sup>

Wigmore’s “doctrine of chances” theory concentrates, not on the *label* which is placed on the similar fact evidence, but on *its logical relevance to the facts of the case in hand*. Once the key role played by relevance is recognised – and labels are thrown away – there is no longer anything to fear from the perception that the jury will judge an accused on character alone. Once this possibility is eliminated, there is no longer any need to distinguish between “character” and “non-character” reasoning. Any evidence which passes the doctrine of chances test, has, by definition, proved its own admissibility through *relevance to the facts of the case for some reason other than character reasoning*.

The importance of this doctrine in avoiding the risks of “character reasoning” had been fully recognised by leading American academic observers such as Imwinkelried,<sup>554</sup> who described it as “. . . a viable, non-character theory of logical relevance”. He offers it as an alternative theory of admissibility which had underpinned the English decisions in both *Makin* and *Smith*, but had not been specifically alluded to in either.<sup>555</sup>

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<sup>551</sup> Wigmore 1, note 522.

<sup>552</sup> In Greenleaf, note 453, at 71-2.

<sup>553</sup> Note 431, § 3.2.4.

<sup>554</sup> Imwinkelried 1993 (note 437), at 79. His argument that “doctrine of chances” theory should replace the contemporary approach of the American courts was further expanded by him in 1990 (note 515), at 590-3.

<sup>555</sup> In Chapter 3, the point was also made that in *Makin*, the Judicial Committee ignored the analytical approach based on doctrine of chances logic which had been employed by the NSW Court of Appeal. In *Smith*, the Court of Criminal Appeal had simply adopted the “lack of accident” category of inclusion suggested in *Makin*. They were both heading down the same wrong road as the Americans.

Wigmore's "doctrine of chances" is considered more fully in the final chapter of this thesis. The only reason which one may conjecture as to why the American courts and legislators ignored the rich legacy of Wigmore's work in this area is that political policy proved stronger than logic and legal principle. They have paid a heavy price for that policy.



## **Chapter 6:**

### **Australian law**

#### **Chapter synopsis**

The first judicial utterance on the admissibility of similar fact evidence under Australian common law was that of Windeyer J in the NSW Supreme Court's judgment in *Makin*. It was based on "doctrine of chances" reasoning. Had it been followed in subsequent decisions of the High Court, then the history of similar fact evidence under Australian law would have presented fewer challenges to practitioners and legal scholars. Instead, the law was allowed to develop along lines which led to the sternest admissibility test of all the common law jurisdictions, namely that propensity evidence is not admissible unless it is so persuasive that a conviction is the only foreseeable outcome of admitting it.

This, in turn, led to avoidance policies in various states and territories of Australia which left the common law on the topic looking more like a geographical lottery than a uniform legal principle. It also led to a rear-guard action at the federal level. The Uniform Laws of Evidence ("Uniform Laws") were an attempt by the Australian Law Reform Commission ("ALRC") to generate a set of laws of evidence which might apply throughout Australia. They first came into effect in 1995, in a limited number of jurisdictions, and followed the traditional 'categories' formula which had failed everywhere else, and which in Australia's case added another layer of confusion and uncertainty to the law. Ten years later, in its review of the Uniform Laws, the ALRC saw no reason for fundamental change.

## Early promise

The ruling of the NSW Supreme Court in *Makin* has already been considered in the context of its rejected role in the development of English law.<sup>556</sup> It will be recalled that Windeyer J's disregarded judgment in NSW had favoured the "doctrine of chances" approach suggested by Wigmore,<sup>557</sup> under which ". . . similar results do not usually recur through abnormal causes".

Windeyer's approach found favour with some academic writers,<sup>558</sup> and at least one English judge after *Makin*.<sup>559</sup> Also, despite the fact that in the first two cases to come before the High Court immediately after *Makin*,<sup>560</sup> it appeared that Australian law was destined to adopt the same 'categories of admissibility' approach as the English courts, Windeyer's analysis also proved to be persuasive in the later rulings of the same Court in *Martin v Osbourne*.<sup>561</sup>

O had been convicted under a Victorian statute of the offence of 'carrying passengers for reward' without being the holder of a commercial vehicle licence. There was evidence that on the day in question (a Friday) he had been carrying

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<sup>556</sup> See note 135.

<sup>557</sup> Note 552.

<sup>558</sup> See Stone, note 59, at 67. Forbes ("*Similar Facts*", The Law Book Company, 1987, at [3.5]) also commented, almost a century after the event, that "It is surprising how seldom the Supreme Court judgments in *Makin* are referred to in Australian courts".

<sup>559</sup> It was the preferred analytical tool of Scrutton J. in both *Ball and Ball* (note 173) and *Smith* (note 180).

<sup>560</sup> See *Hardgrave v The King* (1906) 4 CLR 232 in which similar fact evidence regarding H's prior dealings with money entrusted to him was admitted in order to rebut a defence of "accident", and *The King v Finlayson* (1912) 14 CLR 675, in which, in a similar case, the same sort of evidence was employed in order to establish a dishonest "system" employed by the accused.

<sup>561</sup> (1936) 55 CLR 367.

passengers between Melbourne and Ballarat, and the Prosecution had been allowed to lead evidence that he had also been observed carrying passengers on the same route on the immediately preceding Wednesday and Thursday. This evidence was then employed in order to lead to the inference that on each of these occasions O had been carrying out these activities for reward, in the absence of any direct evidence that the Friday passengers had paid for their travel.

It was the unanimous ruling of each of the four judges that this evidence had been correctly admitted, and in the judgment of Dixon J,<sup>562</sup> may be found the origins of what was to become the ‘no hypothesis of fact consistent with innocence’ test. His Honour observed that:

The frequency with which a set of circumstances recurs or the regularity with which a course of conduct is pursued may exclude, as unreasonable, any other explanation or hypothesis than the truth of the fact to be proved.

When this line of reasoning was applied to the facts of the case, the evidence of the carriage of passengers on the same route on the two previous days made it “. . . . improbable that the passengers were not carried for reward”.<sup>563</sup>

This method of analysis does not require the similar fact evidence to fall within a recognised category of exception to a general exclusionary rule. Instead, the rationale for its admission is the *logical connection* between the previous behaviour and the

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<sup>562</sup> At 375. Evatt J, at 393, also took time to explain precisely how the same principle had been employed in the NSW judgments in *Makin*, in the following terms: “The business of the Makins was of so special a character that it could not be continued profitably unless the infants were killed almost at once. . . . Accordingly, it was highly probable that the death of the particular infant was a death in the ordinary and inevitable course of conducting such business.”

<sup>563</sup> At 377. See also Evatt J at 382-3.

newly-charged criminal act by the accused, making use of our knowledge of human behaviour.

This case did not require, as a pre-condition to the admissibility of the challenged evidence, that it all but eliminate innocence entirely. But this is where the law was heading, in a series of decisions which led to *Pfennig v R*.<sup>564</sup>

### **The road to *Pfennig***

It was over forty years before the first step was taken down this road. By then it had become recognised that ‘relevance’ required to be weighed against ‘potential prejudice’.<sup>565</sup> Then, in *Perry v The Queen*,<sup>566</sup> came the first inkling of the difficulties to follow. The Court was obliged to caution against the uncritical use of the ‘coincidence reasoning eliminating any hypothesis consistent with innocence’ rationale which some had taken to be the *ratio* of *Martin v Osbourne*. But the same Court, only two years later, ignored its own advice. This took Australian law along a course towards an unworkable admissibility test.

In *Sutton v R*,<sup>567</sup> S was charged with a series of rapes of three separate victims, whose complaints were joined on the same indictment. Following his conviction, he

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<sup>564</sup> (1995) 182 CLR 461.

<sup>565</sup> In *Thompson and Wran v The Queen* (1968) 117 CLR 313, at 317, Barwick C.J. and Menzies J. observed that: “. . . a judge should, in a proper case, in the exercise of his discretion, reject such evidence if its prejudicial effect is out of all proportion to its probative value.” In *Markby v The Queen* (1978) 140 CLR 108, at 117, Gibbs A.C.J., with whom the remaining judges concurred, adopted *Boardman* (note 235) into Australian common law by observing that “. . . the principle allowing the admission of the evidence remains subject to the discretionary power to exclude it, even if legally admissible, where its prejudicial effect outweighs its probative value.”

<sup>566</sup> Note 53. Similar warnings were subsequently handed down in *S v The Queen* (1989) CLR 266 and *B v The Queen* (1989) CLR 266.

<sup>567</sup> (1984) 152 CLR 528.

appealed against this joinder on the ground that the similarity of the facts alleged by each victim was not sufficient to justify it. In dismissing his appeal, and deciding (on arguable grounds) that there *had been* sufficient similarity, Dawson J observed that:<sup>568</sup>

If in considering the admissibility of similar fact evidence the trial judge concludes that there is a rational view of that evidence which is inconsistent with the guilt of the accused, then he ought not [to] admit it because in those circumstances the evidence cannot be said to have a sufficiently strong probative force.

While there is, with respect, eminent sense in the suggestion that similar fact evidence should not be allowed before a jury if it has insufficient probative force to outweigh its almost guaranteed prejudicial effect, *that probative force need not be sufficient to guarantee a conviction*. If such a test of admissibility is adopted, then not only is the trial judge usurping the function of the jury in admitting or rejecting it, but the court is being deprived of strongly probative evidence which might lead to the only ‘just’ verdict if it *is* admitted. This point was about to be overlooked in what became the seminal Australian High Court authority on the subject.

In *Pfennig v R*,<sup>569</sup> P was charged with the murder of a young boy (‘Michael’) who had disappeared from a fishing reserve in South Australia in circumstances which might have involved abduction and murder, but whose body had never been located. There was evidence to link P with Michael on the day of his disappearance, and additional evidence of P’s previous plea of guilty to charges of abducting and raping another boy of approximately the same age *after* the date of Michael’s disappearance. P had attempted to make this boy’s disappearance look like an accident, in circumstances very similar to those relating to Michael’s disappearance.

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<sup>568</sup> At 564, citing *Martin v Osbourne*.

<sup>569</sup> Note 564.

P had also confessed to his then wife, following his arrest on the instant charge, that he had been ‘thinking’ about such an offence for some time.

In their majority judgment rejecting P’s appeal,<sup>570</sup> Mason CJ, Deane and Dawson JJ. confirmed that the true test for the admissibility of propensity evidence was that :

. . . there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged . . . . . Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect.

In consigning the previous ‘probity versus prejudice’ test to history, Toohey J. observed that:<sup>571</sup>

An approach in terms only of probative force outweighing prejudicial effect leaves too many questions unanswered. . . . Evidence that an accused has committed other relevant offences must inevitably have a prejudicial effect. But, in the language of *Director of Public Prosecutions v P*, it may nevertheless be “just” to admit the evidence. The reference to just aptly conveys the notion that it is not only the interests of the accused that are involved. The legitimate interests of the Crown and of the community cannot be overlooked. (footnote omitted).

But the strongest criticism, of what had once been hailed as the ‘intellectual breakthrough’ of *Boardman*,<sup>572</sup> came from McHugh J, who opined that:<sup>573</sup>

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<sup>570</sup> At 464-5. They began with the observation that propensity evidence “ . . . may be propensity evidence which falls within the category of similar fact evidence , relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term “similar fact evidence” is often used in a general but inaccurate sense.”

<sup>571</sup> At 506-7.

. . . prejudicial effect and probative value are incommensurables. They have no standard of comparison.<sup>574</sup> The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial . . . . If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation.

In the passage which followed,<sup>575</sup> his Honour, in substance, delivered a judgment which preserved the ‘probity versus prejudice’ test, and defined “prejudice” in terms of “insufficient relevance to the matter in hand”. Thus:

If the risk of an unfair trial is very high, the probative value of evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of an accused a virtual certainty. In cases where the risk of an unfair trial is very small, however, . . . . *I do not think that evidence disclosing . . . . the criminal or discreditable propensity of the accused, must always meet this high standard. . . . in each case where [propensity] evidence is tendered. . . . it is necessary to identify the nature of the risk, if any, to which the admission of the evidence gives rise.*<sup>576</sup> [emphasis added].

McHugh J appears to have been the only member of the Court to have anticipated the difficulties which might flow from the imposition, on all future trial judges, of what became known as “the *Pfennig* test” as the *sole* benchmark for the admissibility of propensity evidence. Instead, he seems to have been arguing for a

<sup>572</sup> See Hoffman, note 266.

<sup>573</sup> At 528-9.

<sup>574</sup> It may also be observed that if one defines “prejudice” as in some way increasing the chances of conviction, then one is in effect attempting to measure the same quantity twice, and the scales will always be even.

<sup>575</sup> At 529.

<sup>576</sup> However, and with respect, his Honour was *still* considering the potential prejudice of propensity evidence generally as something which existed *independently* of its probative value. In the case of ‘similar fact evidence properly so called’ (see note 2), the two are linked, in that *the greater the relevance (probity) of the facts to the issues in the case, the less is the risk of “unfair” prejudice.*

continuation of the sliding scale ‘probity versus prejudice’ test of *Boardman*, but with an added appreciation that “prejudice” in this context means the sort of “unfairness” which can result from the admission of propensity evidence which is insufficiently probative of guilt to justify the risk of the jury employing it for “forbidden” purposes.

This, when properly analysed, sounded the warning that the *Pfennig* formula might not be appropriate for *all* cases. What the majority were laying down as a universal test might well be appropriate in a case such as this, when both the commission of an offence and the identity of the offender were being proved by the known propensity of the accused. However, as subsequent cases were to illustrate, it was to sit uncomfortably in some categories of case in which the relevance of the propensity was less startling, and the risk of prejudice less acute.

Had the majority court made it equally clear that *Pfennig* was a case in which a more general rule was being applied at the ‘high end’ of the probity scale, then all might have been well. Unfortunately, it seemed that ‘probity versus prejudice’, as a benchmark of general application, had now been replaced by a strict new test which required that the trial judge assess, in advance of the admission of such evidence, whether, taken along with all the direct evidence in the instant case, the propensity evidence had the effect of eliminating any interpretation of the facts consistent with innocence.

The headnote to the CLR report of *Pfennig* summarises what had apparently been laid down by the majority in the following terms:

The basis for the admission of propensity or similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, *it bears no reasonable explanation other than the inculpation of the accused in the offence charged*. . . .  
(emphasis added)



It remained to be seen how, or even *if*, this new test would be applied by the intermediate appeal courts of the Australian states and territories.

### Questions left unanswered by *Pfennig*

As recently as 2011, Heydon J, in *Roach v The Queen*,<sup>577</sup> observed that:

There is much to be said for *Pfennig v The Queen*, but it has proved to be unpopular with legislatures.

This was almost an understatement. But as it transpired, several of the states and territories had limited opportunity to respond to *Pfennig* anyway, because of the enactment, in the same year, of the Uniform Evidence Laws, which were intended in due course to apply in all the states and territories of Australia. These Uniform Laws perpetuated the *Boardman* test, and eschewed the reasoning in *Pfennig*.

However, adoption of these Uniform Laws by the states and territories was both slow and uneven.<sup>578</sup> Consequently, most of them had several years at least in which to react to *Pfennig*, and that reaction was far from laudatory. Various uncertainties regarding the workability of the *Pfennig* test in practice soon emerged, both in the scholarly literature and in the judgments of the intermediate courts of appeal, leading to

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<sup>577</sup> (2011) 242 CLR 610, at 627.

<sup>578</sup> The *Evidence Act 1995* (Cth) applied from its inception to proceedings in federal courts and the courts of the ACT. Identical provisions contained in the *Evidence Act 1995* (NSW) became effective in that state in the same year. Tasmania followed six years later with the *Evidence Act 2001* (Tas), and in 2008 Victoria enacted the *Evidence Act 2008* (Vic), which commenced on 1 March 2010. The ACT government introduced its own *Evidence Act 2011* (ACT), with effect from 1 March 2012, in terms all but identical to the Commonwealth Act. The remaining states and territories, at the time of writing, have yet to adopt the Uniform Laws.

overruling legislation in three major jurisdictions. The major uncertainties which became identified were as follows:

*Does the Pfennig test completely replace the Boardman requirement that “probity” be measured against “prejudice”?*

Even some of the judges in *Pfennig* seemed to be unsure whether or not they were laying down a comprehensive new test for the admission of propensity evidence in *all* cases.<sup>579</sup> It was hardly to be expected that academic scholars would be hailing *Pfennig* as a new panacea for use in all cases. Nor did they.<sup>580</sup>

Among the academic rejections of the *Pfennig* test as the new way forward was the complaint that it imposed too high a standard for the admission of evidence of an accused’s relevant past in all cases.<sup>581</sup> This criticism was particularly apt in respect of cases involving multiple complainants, in which even the *possibility* of collusion between them suggested an alternative “reasonable hypothesis”, and would therefore result in the rejection of their testimonies as cross-corroborative of each other. Those state governments which enacted legislation to ensure that such evidence was admitted

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<sup>579</sup> Compare, for example, the majority (at 483) with McHugh J at 529-30 and Toohey J at 507.

<sup>580</sup> See, for example, Bargaric and Amarasekara, (note 11), at 76, who opined that “... it seems that the High Court in *Pfennig* was not attempting to formulate a new standard for the admissibility of similar fact evidence.” In the first edition of the Australian edition of *Cross on Evidence* to be published following *Pfennig* (5<sup>th</sup>, 1996), the test was said (at [21075]) to be that “... the evidence may be excluded by the trial judge in the exercise of the general discretion to reject admissible evidence the probative value of which is insufficient having regard to its prejudicial effect”. This was clearly an expression of belief in the continued application of the broader principle laid down in *Boardman*. N.B. however, that a footnote in the current edition (note 165 to [21085]) states, in relation to the *Pfennig* test, that “Australian law diverges from English on this point: the test there is that the evidence is inadmissible unless its probative value is sufficiently great to make it just to admit the evidence despite its prejudicial effect. He cites *DPP v P*. The learned editor is now a member of the High Court.

<sup>581</sup> Waight and Williams, *Evidence, Commentary and Materials* (5<sup>th</sup> ed, Law Book Co, Sydney, 1998), p.428, and Williams and Draganich, ‘Admissibility of Propensity Evidence in Paedophilia Cases’, (2006) 11 Deakin L. Rev. 1, at 15.

*without* prior enquiry into the possibility of collusion were, in practical effect, ensuring that the *Pfennig* test would not result in rejection of the evidence in such cases.<sup>582</sup>

The later ruling of the High Court in *Roach v The Queen* seemed to limit the application of the *Pfennig* formula to a very specific set of circumstances, and for a very specific purpose. The majority in that case observed that:<sup>583</sup>

The rule in *Pfennig* operates as an exclusionary rule with respect to similar fact evidence tendered for a particular purpose. *Separate and distinct from that rule is the common law discretion to exclude relevant evidence in criminal proceedings. It permits a judge to exclude evidence where its prejudicial effect exceeds its probative value. It is commonly applied to similar fact evidence.* (emphasis added).

In short, that there is a general common law rule governing the admission of propensity evidence – and then there is *Pfennig*, which applies when the probative value of the evidence is so high that it eliminates any hypothesis of fact consistent with innocence.

The latest High Court utterances on the subject at the time of writing, *BBH v The Queen*<sup>584</sup> are equivocal.

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<sup>582</sup> As Calloway JA observed, of the Victorian enactment which had this effect [s 398A of the *Crimes Act 1958* (Vic)], in *R v Best* (1998) 102 A Crim R 56, at 70, “It has adopted a flexible criterion of admissibility similar to that proposed by McHugh J in *Pfennig*’s case at pp. 528-530.”

<sup>583</sup> Note 577, at 616. The appeal dealt primarily with the relationship between *Pfennig* and s 130 of the *Evidence Act 1977* (Qld), which contains, in statutory form, the principle first enunciated in *Christie*, to the effect that a trial judge has a discretion to exclude evidence where to admit it would result in an “unfair” trial. A further layer of confusion was added by the observation of the majority, at 622-3, that once the *Pfennig* test is applied, “there would be no room for the exercise of any discretion”. See also Heydon J, at 630, that “Whatever s 130 refers to, it does not incorporate the *Pfennig* test”.

<sup>584</sup> [2012] HCA 9. Compare, for example, French CJ at [53] with Gummow and Hayne JJ at [68], Crennan and Kiefel JJ, at [157], and Bell J at [197].

Given that, under the stricter view of the *Pfennig* test, the probative value of the propensity evidence which is being admitted all but guarantees a conviction, one needs to be very certain indeed that the evidence is “probative” for the right reason. The mere fact that it all but guarantees a conviction is, *per se*, no justification for admitting it, if the use to which is being put (i.e. its alleged *relevance* to the overall case) is an invalid one. While the Court in *Roach* restricted the *Pfennig* test to “evidence tendered for a particular purpose”, it did not articulate what that purpose *was*.

It was not long before the lack of guidance on this point in *Pfennig* raised further questions regarding its suitability when applied to propensity evidence being admitted for certain “purposes” which had previously been identified, but which were different from the purpose in *Pfennig* itself.<sup>585</sup>

*Does the Pfennig test apply to “uncharged act” evidence?*

The majority Court in *Pfennig*,<sup>586</sup> recognised that what it called “relationship” evidence can itself be a form of propensity evidence. However, the label “relationship” is also often attached to evidence that an accused charged with a sexual offence (most commonly against a young family member) has behaved inappropriately with their victim on *other* occasions which are not represented in the indictment charges. The short-form name given to such other behaviours is “uncharged acts”.

The admission of such evidence, for whatever notional purpose,<sup>587</sup> carries with it a risk of prejudice against an accused if employed for the *wrong* reason.<sup>588</sup> Following

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<sup>585</sup> *Pfennig* is perhaps best described as a case in which ‘similar fact evidence properly so called’ was being admitted to prove *both* the commission of a crime, *and* the identity of the perpetrator. To this extent, it had much in common with *Makin*.

<sup>586</sup> Note 570.

<sup>587</sup> For example, to provide a “realistic context” for the complainant’s testimony (as in *R v Vonarx* [1999] 3 VR 618 at 625, and per Hunt C.J. in *R v Beserick* (1993) 30 NSWLR 510 at 515). In *Gipp v The Queen*

*Pfennig*, this area of law fell into a state of confusion, due to the failure of the High Court to guide the lower courts on how such evidence should be handled following its introduction of the ‘no other reasonable hypothesis’ test.

Writing only four years after *Pfennig*,<sup>589</sup> Andrew Palmer drew attention to the fact that the failure of the High Court to clarify whether that test applied *only* to uncharged act propensity evidence which the Crown sought to employ *directly* in proof of guilt, or whether it also applied to uncharged act evidence which only *revealed* such a propensity indirectly,<sup>590</sup> had already led to a division of opinion in the lower courts. This also remained a matter of considerable contention between academic commentators.<sup>591</sup> It even divided the High Court on the first occasion that it was afforded an opportunity to clarify the matter following *Pfennig*.

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((1998) 194 CLR 106, per Gaudron J at 113) it was also said to be admissible in order to explain the victim’s failure to complain of, or to express surprise at, the accused’s behaviour on the occasion(s) specified on the indictment. In other cases, it has also provided evidence of the “grooming” of the intended victim by an accused.

<sup>588</sup> Nor is that risk diminished in any way by applying a euphemistic label to it. As Dawson J had observed in *S v The Queen* (Note 566, at 275), ‘. . . when such evidence is admitted in a case of this kind it is in truth nothing more than evidence of a propensity on the part of the accused *of a sufficiently high degree of relevance as to justify its admission*’ [emphasis added]. See also Holmes JA in *R v Roach* (note 618) at [19] that ‘. . . bland references to “context” or “relationship” evidence . . . [fail] to acknowledge the propensity reasoning underlying the proposed use of the evidence’. See, in addition, *NJB v R* [2010] NTCCA 5, per Martin CJ at [23].

<sup>589</sup> “Propensity, Coincidence and Context: the Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases”, (1999) 4 Newcastle Law Review 46, 50-51. See also Flatman and Bargaric, in “Non-similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions”, (2001) 75 Australian Law Journal, 191, who observed that “. . . where propensity evidence is not directly relevant to a matter in issue, the ‘another rational view’ test is a logically inappropriate standard to govern its admissibility. A more suitable test involves the balancing of the probative value of the evidence against its prejudicial effect”.

<sup>590</sup> This would, for example, be the inevitable result of admitting such evidence to provide “context” or “background” evidence of the kind described above. If it is not being admitted in order to prove propensity *directly*, goes the argument, then the “propensity” test ought not to be applied.

<sup>591</sup> Compare, for example, the claim by Smith and Holdenson in “Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions”, (1999) 73 Australian Law Journal 432, at 430, that the majority in *Pfennig* intended the “no reasonable hypothesis” test to apply to “. . . all evidence which reveals the commission of offences other than those with which the accused is charged”, with the assertion of Flatman and Bargaric (note 589, at 196) that “. . . it would seem that the another rational view test is conceptually not suitable in the context of relationship evidence”, because “. . . it will always result in its inadmissibility, since by definition relationship evidence does not carry the special probative force which is a feature of similar fact evidence”. Palmer (note 589, at 64) agreed with the latter view.

In *Gipp v The Queen*,<sup>592</sup> seven allegations of sexual abuse by a man of his step-daughter were supplemented by evidence in chief by her which indicated that the specified acts were simply the tip of an iceberg. The jury were allowed by the trial judge to consider this evidence because it demonstrated “. . . the nature of the relationship between the complainant and the accused”.<sup>593</sup> McHugh and Hayne JJ,<sup>594</sup> had no doubts that the uncharged acts evidence had been admissible:

. . . . to show the relationship which existed between the parties and to explain why the complainant so readily complied with the various demands of the appellant. . . . The evidence . . . . . was admitted for the limited purpose of making the circumstances of the specific offences more intelligible . . . If the evidence had been tendered to prove propensity, it would have required careful direction in accordance with the principles emphasised by this Court on numerous occasions in recent years.<sup>595</sup>

Clearly, they did not regard the challenged evidence as falling under the *Pfennig* test, since it did not involve any “propensity” reasoning; for the same reason, they did not appear to be unduly concerned that the trial judge had not warned the jury *against* propensity reasoning.<sup>596</sup> This was despite the fact that whatever justification might be given for its admission, it *indirectly* revealed unflattering information regarding the accused’s propensity. There was no reference in their judgment to the need for the trial judge to exclude the uncharged act evidence in accordance with any principle of “fairness” to the accused. Still less do they seem to have required the probative value of that evidence to be assessed against its prejudicial potential.

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<sup>592</sup> Note 587.

<sup>593</sup> As reported at 111.

<sup>594</sup> At 130-2.

<sup>595</sup> Citing *Pfennig*. Note the ongoing confusion between what might be termed ‘mere background’ use of such evidence and its description as “relationship” evidence, which in *Pfennig* had been identified as a form of propensity reasoning, *the very context in which “careful direction” is required*.

<sup>596</sup> While observing (at 133) that “. . . it would have been better” had he done so, they added (*ibid*) that “Having regard to the conduct of the case and the rest of his Honour’s summing up, there is no reason to suppose that the jury might have used the general behaviour evidence as propensity evidence.” In the circumstances, this was an optimistic assumption.

Only Kirby J,<sup>597</sup> appears to have acknowledged the danger of admitting what was in reality “tendency” evidence, without emphasising to the jury the limited purpose for which it was being adduced<sup>598, 599</sup>.

This ongoing failure by the Court to clarify matters was freely conceded by one of its own in *KRM v The Queen*,<sup>600</sup> in which McHugh J. observed that:

. . . an important question still to be resolved by this Court is whether the ‘no rational view’ test of admissibility applies to all evidence revealing criminal or discreditable conduct or only to evidence tendered to prove propensity and to evidence proving similar facts.

What was clearly *also* still missing was any indication of precisely *which* test of admissibility they should apply to so-called “background evidence” – the more demanding *Pfennig* test, or the more flexible “probity versus prejudice” alternative, if indeed it *was* still available as an alternative. There was also an unresolved tension between allowing such evidence before the jury in order to reveal the prior sexual relationship between the accused and their victim, while at the same time instructing them that they were not allowed to use such evidence as revealing any “propensity” on the part of the accused to behave sexually towards them.<sup>601</sup>

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<sup>597</sup> At 156.

<sup>598</sup> Having confirmed (at 156) that “Evidence of this kind is only admissible if its probative value outweighs its prejudicial effect”, he ordered a new trial (at 157), *inter alia* on the ground that “. . . . assuming . . . . that the evidence was . . . . admissible as tendency evidence . . . the primary judge gave absolutely no warnings about the dangers of the use of such evidence.” With respect, whether it was “admissible” or not, on *any* ground, the jury were allowed to hear it, without any judicial direction as to how they might use it, and this was sufficient ground to overturn the resulting conviction.

<sup>599</sup> Although they were prepared to make the distinction between uncharged acts used for propensity purposes and its use as “background evidence”, the remaining judges (Gaudron J at 112, and Callinan at 168) were not prepared to offer guidance on what test of admissibility should apply to such “background” evidence.

<sup>600</sup> (2001) 206 CLR 221 at 231.

<sup>601</sup> A disturbing example of this process is to be found in the directions of the trial judge to the jury in the Victorian case of *EF* (2008) 189 A Crim. R 463, in which the trial judge first advised the jury (as reported

The High Court declined another opportunity to give authoritative guidance in this area in *Tully v The Queen*,<sup>602</sup> in which the only judge to comment on the confusion which had arisen regarding the appropriate test to apply in respect of uncharged acts was Kirby J,<sup>603</sup> who contented himself with the conclusion,<sup>604</sup> that “It would be preferable for this Court to consider the law on the directions appropriate to evidence of uncharged acts in a case that lacks the forensic peculiarity of the present appeal”.

Confusion continued to dominate the judgments of intermediate appeal courts at state level, which had looked in vain to the High Court for guidance. Some states went so far as to enact legislation whose effect was to bypass *Pfennig* altogether.<sup>605</sup> Two of them,<sup>606</sup> in effect, restored, for all cases in which propensity evidence was to be revealed to the jury, and for *whatever purpose*, the House of Lords formulation of the test in *DPP v P*.<sup>607</sup> As was observed in one of the leading cases to interpret the Victorian legislation, the test was now the same for *all* evidence of uncharged acts, regardless of the purpose for which it was adduced, and regardless of what the Court in *Pfennig* may have intended.<sup>608</sup>

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at 469) that the evidence of uncharged acts was admissible in order to demonstrate the accused’s “guilty passion” for the complainant, but then counselled them against concluding that he was therefore “. . . the kind of person to have committed the crimes charged . . .”. This confusing piece of sophistry was not even commented on by the Court of Appeal when rejecting the accused’s appeal. It concluded instead that this had been “a strong and appropriate warning against the dangers of propensity reasoning”. For a more recent example of such muddled thinking, this time in the context of a multi-count indictment involving three separate complainants, see *Pretorius* [2010] 1 Qd R 67.

<sup>602</sup> (2006) 230 CLR 234.

<sup>603</sup> His Honour was able to cite no less than eleven cases in which this confusion had been manifest.

<sup>604</sup> At 255.

<sup>605</sup> These are considered in a later section of this chapter.

<sup>606</sup> *Crimes Act 1958* (Vic), s 398A and *Evidence Act 1906* (W.A.), s 31A.

<sup>607</sup> Note 289.

<sup>608</sup> *R v Best* (note 582) at 70, per Calloway JA. It was, however, subsequently emphasised by the unanimous Court in *R v Vonarx* (Note 587), at 625, that when uncharged act evidence was admitted in order to allow the complainant’s evidence to be “. . . assessed and evaluated within a realistic contextual setting”, then the jury should be warned to avoid any propensity reasoning. The Queensland Court of Appeal, in *R v W* [1998] 2 Qd. R. 531 (another “uncharged acts” case, almost identical on its facts to *Gipp*), concluded (at 534 and 537) that *Pfennig* could not be applied, because its strictness would always result in “uncharged act” evidence being excluded.



A suitable opportunity for the High Court to speak with one voice on this question, and to restore its authority in the states and territories still governed by common law rules, presented itself in *HML v The Queen*.<sup>609</sup> To describe the sum total of the 171 pages of judgment in this case as a disappointment would be a polite euphemism.

The issues on appeal were, in essence, (a) whether such uncharged act evidence was admissible at all, and if so, (b) what directions the trial judge should have given to the jury regarding the use which they could make of it. The Court divided evenly on the issue of whether or not such evidence was covered by the *Pfennig* test.<sup>610</sup>

There was not even any agreement *within* each school of opinion as to the basis for the admissibility of such evidence.<sup>611</sup> There was, however, a clear majority in favour of the assertion that “relationship” evidence admitted in proof of propensity would satisfy the *Pfennig* test,<sup>612</sup> and unanimity on the proposition that such evidence must be proved beyond reasonable doubt if it is to be admitted for a “propensity” purpose.<sup>613</sup>

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<sup>609</sup> (2008) 235 CLR 334. The case originated in South Australia, which was at the time, and continues to be, governed by common law rules in this area. It was a case of a father accused of sexual offences against his natural daughter, this time in Adelaide, in which the Crown had been permitted to adduce evidence of other similar (and some different) offences against her both before and after the dates of the offences on the indictment.

<sup>610</sup> In support of what might be termed the ‘inclusive’ view that all such evidence should be required to pass the *Pfennig* test even when its effect is merely to *reveal* the accused’s previous misdeeds were Gummow J (at 362), Kirby J (at 364), and Hayne J (at 383). The alternative, ‘exclusive’ view of Gleeson CJ (at 359), Crennan J (at 485) and Kiefel J (at 502) was that the *Pfennig* test was not applicable to uncharged act evidence which was not being used in direct proof of guilt via propensity.

<sup>611</sup> The Full Court unanimously dismissed the appeal, but each of the seven judges gave different reasons for so doing.

<sup>612</sup> Per Gleeson CJ at 359, Gummow J at 362, Kirby J at 364, Hayne J at 386 and Heydon J at 431. This conclusion is perhaps unsurprising, given that, as Stuesser (“The Need to Legislate the Law on Similar Fact”, *The Journal of the Bar Association of Queensland*, Issue 35, June 2009, p.1) points out, “. . . the fact that the accused sexually assaulted the complainant on other occasions is only consistent with guilt. There is no other innocent explanation”.

<sup>613</sup> This was despite the fact that the task of deciding something beyond reasonable doubt is, traditionally, the role of the jury at the *end* of the trial, and not that of the trial judge at an *interlocutory* stage.

Stuesser,<sup>614</sup> describes this process as “circular reasoning at its worst”, and in cases in which such a test is applied, the trial judge is being called upon either to arrive at an inference of guilt of the accused ahead of the jury, or to withhold from them what might be, in the final analysis, a significant element of the Crown’s case, because the trial judge does not believe that at the end of the day the *overall* Crown case is likely to lead to a conviction.<sup>615</sup>

It was left to the long-suffering intermediate state appeal courts to make some sort of sense of what had been handed down in *HML*, in a ‘hunt the *ratio decidendi*’ exercise. The surprising consequence was a degree of unanimity of opinion regarding what the judgments amounted to in aggregation, whether or not it was what the Court as a whole had intended to lay down.

First, they concluded that the *Pfennig* test is applicable when the uncharged act evidence is actually being adduced in *direct proof of guilt*, either through “similar fact” logic, or as a circumstantial link in the chain of guilt.<sup>616</sup> In such a case, the jury should be directed that they may only rely upon the uncharged act evidence if they are satisfied of its veracity beyond reasonable doubt.

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<sup>614</sup> Note 612, at p. 2. In Stuesser’s words, the trial judge is concluding, in advance of the jury’s verdict, that “. . . the evidence is admissible to prove guilt because the only rational explanation for the evidence is guilt”. The same could be said of *any* application of the *Pfennig* test.

<sup>615</sup> For those lawyers educated in the common law tradition, there is also something disturbingly counter-intuitive in allowing a complainant, as a witness, to enhance the credibility of their allegations by means of self-serving additions. One does not eliminate the possibility that Statement 1 is a lie by allowing in Statement 2, from the same witness, regarding which there is no additional guarantee of reliability. Put more crudely, *two lies leaning against each other do not make a truth*. For this reason, as McHugh J observed in *Palmer v R* (1998) CLR 1, at 21, “. . . evidence is not admissible if it merely bolsters the credibility of a party or witness”.

<sup>616</sup> This would include, for example, the accused’s “guilty passion” for the complainant, as demonstrated by their previous actions, leading to the conclusion that they were activated by the same guilty passion on the occasion(s) in question.

As for uncharged act evidence which is being admitted for some *less direct* purpose,<sup>617</sup> the *Pfennig* test should *not* be applied. In such cases, they ruled, the *DPP v P* test still applies.

These statements of law are the distillation of a significant number of post-*HML* rulings at intermediate Court of Appeal level.<sup>618</sup> The very existence of these rulings is both a powerful denunciation of the failure of the High Court to supply leadership and guidance in an area of the law in dire need of both, and clear proof that the *Pfennig* formula lacks general utility. This much was finally admitted by the Court itself in *Roach v The Queen*,<sup>619</sup> in which evidence which was clearly prejudicial to R, in that it suggested his propensity to commit the type of offence on the indictment, had been admitted on the ground that it constituted merely “background” evidence.

The Court declined to extend to that evidence the safeguard of the *HML* requirement,<sup>620</sup> that such evidence be proved “beyond reasonable doubt”. This was because the evidence was not being used as “circumstantial evidence in proof of the offence charged”,<sup>621</sup> but simply for the limited “background” purpose identified by the trial judge. This, with respect, completely ignores the fact that, *whatever the reason for its admission*, the jury was being exposed to its prejudicial effect. But the Court had at

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<sup>617</sup> These include providing the “contextual background” for the indictment charges, explaining the reaction of the complainant to the otherwise seemingly isolated incidents, or answering questions which might otherwise remain in the minds of the jury.

<sup>618</sup> The leading case authority in Victoria is *R v Sadler* (2008) 20 VR 69, which was followed in *R v EF* (note 601), *R v ML* [2009] VSCA 106 and *Scetrine v R* [2010] VSCA 194. See also *Michael Wilson v R* [2011] VSCA 328. For New South Wales, see *DJV v R* [2008] NSWCCA 272 and *DTS v The Queen* (2008) 192 A Crim R 204, while in Western Australia the leading authorities are *GBT v The State of Western Australia* (2009) 192 A Crim R 483 and *PIM v The State of Western Australia* (2009) 196 A Crim R 516. Finally, for Queensland, see *R v Rae* (2008) 191 A Crim R 279 and *R v Roach* (2009) 213 A Crim R 485, which is considered again below.

<sup>619</sup> Note 577. During R’s trial for AOBH against his former de facto, evidence had been admitted of his previous acts of violence against her because the trial judge was of the opinion that without it, the jury would be faced with “a seemingly inexplicable or fanciful incident” (at 611). This put the evidence in question into the “background evidence” category, and the Crown disavowed any reliance on the evidence for a “propensity” purpose, although it was the belief of the Queensland Court of Appeal (note 618) that it only had relevance in that context.

<sup>620</sup> Note 613.

<sup>621</sup> At 626. Heydon J, at 631, was of the belief that the trial judge had given a direction in terms of *HML* anyway.

least appeared to be confirming that “background” evidence of prior acts was not admissible as “propensity” evidence; ironically, of course, if it were, then the accused would receive greater protection. Clearly, however, such evidence was not required to run the gamut of *Pfennig*.

But the confusion is still not resolved. In the latest case in this series, *BBH v The Queen*,<sup>622</sup> BBH appealed his conviction of various counts of indecent dealing with, and sodomy of, his daughter, C, on the ground of the admission by the trial judge of additional evidence from his son (H), to the effect that he had witnessed his father in a compromising situation with C, who was naked from the waist down.

This was, in terms of the indictment, an “uncharged” act, and it had been admitted on two seemingly contradictory grounds. These were (a) that it disclosed “the true relationship” between the accused and his daughter (which therefore placed it within one of the “propensity” categories identified in *Pfennig*), **and** (b) that it put the indictment charges “in their proper context”, which suggested that the purpose for the admission of the evidence was *not* a “propensity” one. To further underline this dichotomy of admissibility reasoning, the trial judge, while warning the jury against using the uncharged act evidence as “tendency” evidence, also instructed them that they might use it “to evaluate and decide that the complainant’s evidence is true”.

French CJ was prepared to grant a new trial on the basis that the equivocal nature of the incident observed by H was such that it should not have been admitted. But the remaining judges chose to investigate yet again the issue of whether or not the *Pfennig* test ought to be applied to evidence of this kind.

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<sup>622</sup> Note 584.

Hayne and Gummow JJ concluded,<sup>623</sup> that because the evidence of H was capable of an innocent explanation, it failed the *Pfennig* test, and should not have been admitted. The inference is therefore that *all* uncharged act evidence is covered by the *Pfennig* test, even if offered solely by way of background, or “context”.

Heydon J,<sup>624</sup> regarded H’s evidence as tending to demonstrate the accused’s “motive to commit the crimes charged, namely “sexual passion”. This required the trial judge to apply the *Pfennig* test to it, and assume it to be true.

Crennan and Kiefel JJ had no doubt that H’s evidence proved *either* the accused’s sexual interest in C, or “an act similar to the offences charged”. Either way,<sup>625</sup> “. . . it was relevant to show [the accused’s] propensity”, and that since it “. . . might be employed . . . in propensity reasoning towards guilt . . . the test in *Pfennig* is therefore attracted”.<sup>626</sup> Applying that test:

. . . it was the coincidence of both [C] and [H] independently giving evidence of such events which gave the evidence such probative force. There could be no suggestion of collusion . . . No credible innocent explanation for the conduct observed by [H] comes to mind.<sup>627</sup>

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<sup>623</sup> At [77].

<sup>624</sup> At [105].

<sup>625</sup> At [152].

<sup>626</sup> At [153]. Bell J, at [172], also required that the evidence pass the *Pfennig* test, which for her it did, although she seemed unsure whether it constituted evidence of the accused’s “propensity”, or evidence of his “guilty passion” (compare [172] with [191]. The point would seem to be largely semantic anyway. All three of their Honours declined to categorise the evidence as merely “background” evidence employed in order to explain, or render more intelligible, C’s evidence regarding the indictment offences.

<sup>627</sup> At [159] & [160].

At least the Court appears, in this most recent set of rulings, to have been prepared to recognise the reality of exposing a jury to information regarding the prior, seemingly ominous, actions of an accused in a sexual offence case. Regardless of how such evidence may be *categorised*, the jury is likely to employ it in “propensity” reasoning, and it is therefore essential that they not be allowed to learn of it unless it satisfies the strict criterion of *Pfennig*, namely that it eliminate all reasonable hypotheses consistent with the accused’s innocence of the offences on the indictment.

*BBH* does not sit comfortably with *Roach*, and intermediate appeal courts may confidently be expected to adopt their own approaches.<sup>628</sup> Nor is this the only context in which *Pfennig* has failed to provide guidance.

*Is the Pfennig test applicable to res gestae evidence?*

The same “context” argument employed to justify the admission of “uncharged acts” evidence is often employed by Crown Counsel seeking to ensure that a trial jury receives “the full story” behind the indictment charges, even when that full story contains chapters which reflect unfavourably on the accused. The convenient shorthand phrase frequently employed by Crown Counsel in this context is “*res gestae*”.

In many cases, the evidence which they are seeking to adduce could hardly be said to fit neatly within that well-understood concept;<sup>629</sup> if it did, then it would not be necessary to seek its admission, because it would be part of the Crown’s case in chief.<sup>630</sup>

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<sup>628</sup> See, for example, *AJE v State of Western Australia* [2012] WASCA 185, another “uncharged act” case, in which the W.A. Court of Appeal, post-*BBH*, still opted to follow the rulings of its own Court of Appeal, along with that of Victoria.

<sup>629</sup> “Res Gestae” translates into English loosely as ‘the very things into which the court is enquiring’.

<sup>630</sup> This is the same as what the *Criminal Justice Act 2003* (E+W), s 98 describes as having “to do with the facts of the case” (see note 358). For example, if a man is accused of a serious assault on a fellow

But there is also another line of authority, epitomised by *O’Leary v The Queen*,<sup>631</sup> under which additional misconduct by an accused leading up to, or perhaps subsequent to, the incident on trial, may be admitted as part of the Crown’s case, because this additional misconduct, and the event(s) on trial, are regarded as being a “connected series of events . . . which should be considered as one transaction”.<sup>632</sup>

The argument here,<sup>633</sup> is that the evidence may safely be admitted, and a propensity warning will not be required, because there is no serious risk that the jury will use the marginal additional evidence for “propensity” purposes. As long as it is possible to make such a clear distinction between such different uses of an accused’s previous misbehaviour, then there is no danger of “unfairness”. However, it is not always that clear cut.<sup>634</sup>

The High Court ruling in *KRM v The Queen*,<sup>635</sup> is authority,<sup>636</sup> for the inclusion of both relationship evidence in child sex abuse cases and evidence of the type admitted in *O’Leary* within the same category, requiring the same test of admissibility regardless of the precise ground for its admission.<sup>637</sup> McHugh J observed,<sup>638</sup> that whether or not

prisoner, it is integral to the facts of the case that he was a serving prisoner at the time, and the defence could hardly seek to keep that fact from the jury. As McHugh J ruled in *Harriman* (note 6), at 633, “If evidence which discloses other criminal conduct is characterised as part of the transaction which embraces the crime charged, it is not subject to any further condition of admissibility.”

<sup>631</sup> (1946) 73 CLR 566

<sup>632</sup> Per Dixon J, *ibid.*, at 577. In that case, the charge on trial was a murder during the course of a drunken debauch at a remote bush camp, and evidence was admitted of O’s violent assaults on other victims during that same debauch, prior to the killing. See also *R v Lyons* (1992) 1 Tas R 193.

<sup>633</sup> See, for example, Flatman and Bargaric, note 589, at 202.

<sup>634</sup> See *R v C* [2002] QCA 82, in which, notionally as “part of the *res gestae*, descriptive of the appellant’s manner of dealing with the complainant at the critical time”, the Queensland Court of Appeal condoned the admission in evidence of a statement made by C immediately after allegedly raping a 15 year old girl, that he had done a similar thing in the past. See also *R v Pettigrew* [2001] QCA 468, for a similar decision, this time in a murder case, and in the context of the accused’s state of mind at the time.

<sup>635</sup> Note 600. This was yet another case involving “relationship” sexual evidence relating to a man and his child victim. It was followed in *R v C* (Note 79).

<sup>636</sup> Per McHugh J, at 229.

<sup>637</sup> The analogy seems to have arisen from the remarks of Dixon J in *O’Leary* (note 631, at 577) to the effect that without the evidence of what had transpired earlier, the evidence of those who witnessed the eventual murder would have “presented as an unreal and not very intelligible event”, which is of course one of the rationales for admitting relationship evidence.

the *Pfennig* test required a higher hurdle to be cleared before such evidence might be admitted was an issue “still to be resolved by this Court”. A decade later, it *still* has to be resolved.

Even some academic commentators seem to have conflated *res gestae* evidence with ‘relationship’ evidence in sexual abuse cases.<sup>639</sup>

### *The role of the trial judge under Pfennig*

Another issue which arose when the courts set about trying to implement *Pfennig* was whether or not the “no reasonable hypothesis” test was to be applied to the Crown case *as a whole*, or simply to the *contested* item of evidence. Although simple logic suggests that it is the Crown’s case *as a whole* which must exclude any hypothesis consistent with innocence,<sup>640</sup> a good deal of confusion was created by the reference in *Pfennig* to propensity evidence being a form of circumstantial evidence.<sup>641</sup> The assumption that, as such, it required proof beyond reasonable doubt, appeared to be confirmed by the insistence of the later Court in *HML*,<sup>642</sup> that propensity evidence had to be proved beyond reasonable doubt before it could be relied upon. This was certainly

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<sup>638</sup> At 230.

<sup>639</sup> See, for example, Flatman and Bargaric, note 589, at 201 and 205.

<sup>640</sup> For example, in *R v Ball and Ball* (note 173), the facts that the two accused had previously shared a bed, and that the female accused had born a son to her brother, both at a time when incest was not a crime, meant nothing in the absence of evidence of ongoing cohabitation at the time specified in the indictment when that behaviour had become criminal. It was the *later* event which had to be proved beyond reasonable doubt, not what had transpired earlier. See also McHugh and Hayne JJ in *Gipp* (note 587) at 133, that “. . . it is the charge, not the surrounding facts, that must be proved beyond reasonable doubt”.

<sup>641</sup> In *Shepherd* (1990) 170 CLR 573, the High Court had held that when an item of circumstantial evidence is “an indispensable link” in the chain of proof of guilt, then it must be proved beyond reasonable doubt.

<sup>642</sup> Note 609.



the view of the law taken subsequent to *HML* in Queensland,<sup>643</sup> Victoria,<sup>644</sup> South Australia,<sup>645</sup> New South Wales,<sup>646</sup> and Western Australia.<sup>647</sup> From this, it was a simple, if erroneous, conclusion that the similar fact evidence was required to discharge the Crown's burden of proof all on its own.

Academic scholars argued the point,<sup>648</sup> while some judges,<sup>649</sup> expressed the view that the *Pfennig* test was a very onerous one to satisfy on the assumption that it was the propensity evidence alone which had to eliminate all hypotheses consistent with innocence. Similar concerns were expressed by the Queensland Court of Appeal in *R v W*,<sup>650</sup> again based on what seems to have been the early assumption that the similar fact evidence was required to prove the Crown's case beyond reasonable doubt all on its own. In *R v Wackerow*,<sup>651</sup> a compromise solution was suggested which was to have serious consequences in later cases, namely that the *propensity* evidence should be such that "... there is no reasonable view of it other than as supporting an inference that the accused is guilty".<sup>652</sup> The confusion was eventually resolved by the High Court's ruling in *Phillips v The Queen* that:<sup>653</sup>

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<sup>643</sup> *R v UC* [2008] QCA 194, per Muir JA at [47]; *R v ATR* [2008] QCA 385 at [76]. This was despite the fact that a previous Court of Appeal in that State, in *R v O'Keefe* [2001] 1 Qd R 564, had opted for the view that it was the Crown's case *as a whole* which had to eliminate reasonable doubt.

<sup>644</sup> *Sadler*, note 618, at [59].

<sup>645</sup> *R v S, PC* (2008) 102 SASR 199, at [14].

<sup>646</sup> *DJV v R* (Note 618). Given the application of the Uniform Laws in this State, this decision is strictly *obiter*.

<sup>647</sup> *PIM v State of Western Australia*, (Note 618). This decision was arrived at in the context of the application of s 31A of the *Evidence Act 1906* (WA), and may therefore also be regarded as an *obiter* ruling.

<sup>648</sup> Compare, for example, Mahoney, "Similar Fact Evidence and the Standard of Proof", [1993] Crim. L.R. 185, 187, with Hamer, "The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence", (2003) 29 Monash University Law Review, 137, at 179. See also Odgers, "Proof and Probability", (1989) 5 Aust. Bar Rev. 137, at 144.

<sup>649</sup> See, for example, *R v Best* (Note 582), per Calloway JA, at 72.

<sup>650</sup> Note 608, at 533-4. This case has already been cited as one example of the confusion which reigned in state appeal courts regarding the future admission of uncharged acts evidence in the aftermath of *Pfennig*.

<sup>651</sup> [1998] 1 Qd R 197, at 204, per Pincus JA.

<sup>652</sup> This was lifted, out of context, from *Pfennig* at 481, although it was then conceded that the inference had to supply "strong support" for a conclusion of guilt.

<sup>653</sup> (2006) 225 CLR 303, at 323.

*Pfennig v The Queen* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused.

This did not, however, resolve the related issue of the precise role of the trial judge in acting as gatekeeper for the admission of such evidence, which still dogs any attempt to apply the *Pfennig* test, and which is further exacerbated when that test is applied to the Crown's case *as a whole*. More than one observer,<sup>654</sup> made the point that deciding the ultimate issue of an accused's guilt is the function of a *jury*, not a trial judge, and this much had been conceded in *Pfennig*.<sup>655</sup>

Another important factor is the precise *timing* of the judge's decision. A jury will only be asked to decide upon the guilt or otherwise of an accused after hearing all the evidence available in the case, including that, if any, for the defence. The trial judge, by contrast, is being called upon to make the same decision at a much earlier stage in the proceedings,<sup>656</sup> based on whatever evidence has been led already, or is available to the trial judge from the depositions.

Finally, and most persuasively, the strength of the Crown case *without* the propensity evidence (which is all the trial judge has when called upon to assess the latter's admissibility) is a different matter altogether from the strength of the Crown's

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<sup>654</sup> See, for example, Clough, "*Pfennig v The Queen*: A Rational View of Propensity Evidence?" (1998) 20 Adel L.R. 287, at 297 and Hamer, (note 648), at 137. Academic opinion was in fact divided on the appropriateness of such an arrangement. On the one hand was the consideration that if an experienced criminal lawyer formed the belief that the evidence in question was sufficiently probative to be admitted for the right reason, then there could be no risk of a jury using it for the *wrong* reason (see, e.g., Palmer, note 49, at 168). But against that must be weighed the risk of presuming that a trial judge is less susceptible to natural human bias and 'irrational reasoning' than the average juror, and that, having formed a preliminary view of the accused's guilt, he or she is capable of keeping that from the jury, even subconsciously (for which see Hamer, "Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious", (2007) 30 UNSW Law Journal 609, at 613. See also Blanck et.al. (note 41).

<sup>655</sup> At 516, per McHugh J.

<sup>656</sup> This may be even before the trial proper begins, if the application to exclude the evidence is made pre-trial. It will certainly have to be made before the defence presents its case.

case *after* that evidence has been added to the factual mix.<sup>657</sup> This places the trial judge in the (perhaps reluctant) role of a silent prosecutor who has in their possession knowledge of the fact that the accused has something in their past which will act as the final nail in the coffin of their defence.

If the effect of admitting the propensity evidence will be that there is no prospect left of an acquittal, then, goes another argument, why do we need the jury at all? If the *Pfennig* test is so fool-proof in its guarantee of a ‘safe’ finding of guilt, without recourse to “forbidden reasoning”, then the admission of the propensity evidence is the equivalent of a finding of guilt, absent a very persuasive defence.<sup>658</sup> But that finding is, in reality, being forced onto the jury by the trial judge.

The jury must reach their decision on the *whole* of the evidence in the case; at its best, *Pfennig* obliges a trial judge to make the same decision (guilt or innocence) before the defence has even opened its case. This much has now become accepted by intermediate appeal courts; for example, in *AJE v The State of Western Australia*,<sup>659</sup> it was held that when the trial judge is assessing whether or not propensity evidence possesses “significant probative value”, it must be “taken at its highest from the perspective of the prosecution”,<sup>660</sup> but that it is then for the jury to decide (a) whether or not to accept it, and (b) how much weight to give it.

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<sup>657</sup> Clough, note 654, at 299-300, illustrates this point by reference to the facts of *Pfennig* itself.

<sup>658</sup> One wonders whether or not the same result would have obtained in *Pfennig* had P been able to supply a credible alibi for the day in question, rather than admitting that he had met M on the day he disappeared.

<sup>659</sup> Note 628, at [73], per Mazza JA and Beech J.

<sup>660</sup> This, of course, requires an assumption that it is *true*.

*Attempts to avoid Pfennig at state level*

Given the difficulties posed by *Pfennig*, it was hardly surprising that the governments of several states began implementing alternatives.<sup>661</sup>

Western Australia led the way in 2004 with s 31A of the *Evidence Act 1906* (W.A.), which overrode *Pfennig*, and restored the pre-*Pfennig* requirement that probity outweigh prejudice, as laid down in *Boardman* and *DPP v P*.<sup>662</sup> While, in other jurisdictions, it was not entirely certain how extensive the *Pfennig* test was meant to be in its application, it clearly was not to be applied in *any* context in Western Australia. In *Stubley v The State of Western Australia*,<sup>663</sup> the majority High Court,<sup>664</sup> confirmed that s 31A:

. . . . abrogates the common law rule that similar fact evidence is inadmissible unless, when considered with the other evidence in the prosecution's case, there is no reasonable view of the similar fact evidence that is consistent with the innocence of the accused.

Another fundamental retreat from the strictness of *Pfennig* occurred in Victoria. Section 398A(2) of the *Crimes Act 1958* (Vic) restored the “probity versus prejudice”

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<sup>661</sup> In *Roach* (note 577), Heydon J (at 628) observed that “All Australian legislatures have abolished *Pfennig v The Queen* . . . except Queensland, South Australia and the Northern Territory”. In fact, even Queensland, in s 132A of its *Evidence Act 1977*, had sought to bypass the pre-*Pfennig* ruling of the High Court in *Hoch* (note 303) that testimony from several complainants in a case should be excluded if collusion between them could not be eliminated.

<sup>662</sup> As will be seen later in this chapter, it also brought the law in that state closer to that laid down under the Uniform Laws of Evidence.

<sup>663</sup> (2011) 242 CLR 374. This case is further considered below. See, also *Wood v The State of Western Australia* [2005] WASCA 179, *Horsman v The State of Western Australia* (2008) 187 A Crim R 565, and *Dair v The State of Western Australia* [2008] WASCA 72, in all of which the Court had occasion to note the effect of s 31A.

<sup>664</sup> Gummow, Crennan, Keifel and Bell JJ, at [11]. At the same time, of course, their Honours were further obscuring the clarity of their ruling in *Phillips* (note 653) that the “no reasonable hypothesis” test was to be applied to the *whole* of the Crown's evidence.

test first handed down in *Boardman*, while Subsection (3) also circumvented *Hoch*, and accorded with the House of Lords position in *DPP v H*.<sup>665</sup> In *R v Best*,<sup>666</sup> Calloway JA, with whom the remaining judges concurred, observed that “ . . . s 398A adopts the English test of admissibility for all propensity evidence and questions of collusion and unconscious influence are left to the jury.”<sup>667</sup>

While the High Court might be powerless to prevent the avoidance of its rulings in *Hoch* and *Pfennig* by means of state legislation<sup>668</sup>, it is not so powerless when one of its judgments is adjusted to suit the preferences of a state judiciary. This lesson was learned – the hard way – by the Queensland Court of Appeal in *Phillips v The Queen*.<sup>669</sup>

In a series of cases beginning with *Wackerow*,<sup>670</sup> the Queensland Court of Appeal had suggested a less strict interpretation of *Pfennig* which required that the propensity evidence which it was sought to admit need only “support an inference that the accused is guilty”.<sup>671</sup> In *R v O’Keefe*,<sup>672</sup> Thomas JA reformulated this less strict interpretation into two tests for Queensland judges to follow when asked to admit propensity evidence in future cases. They were:

- (a) Is the propensity evidence of such calibre that there is no reasonable view of it *than as supporting an inference that the accused is guilty of the offence charged?*

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<sup>665</sup> Note 294.

<sup>666</sup> Note 582, at 64. *Best* was still being followed shortly before the Uniform Laws became effective in Victoria; see *Tognolini v R* [2011] VSCA 394, an appeal from a trial held in 2009.

<sup>667</sup> The long-term implications of s 398A were critically examined by Arenson, (note 3), at 275 et seq.

<sup>668</sup> Each state within the Commonwealth is empowered to legislate in respect of its own criminal justice system; *Commonwealth of Australia Constitution Act 1902* (Cth), s 108.

<sup>669</sup> Note 653.

<sup>670</sup> Note 651.

<sup>671</sup> See, for example, *R v Ingram* [1996] QCA 294, *R v W* (Note 53), *R v Smith* [1997] QCA 350 and *R v Carne* (1997) 94 A. Crim. R. 249.

<sup>672</sup> Note 643.

- (b) If the propensity evidence is admitted, is the evidence as a whole *reasonably capable* of excluding all innocent hypotheses?

This was a significant departure from the stricter test which had been laid down in *Pfennig*, and it relied on every trial judge who had access to all this incriminating evidence against an accused in the trial depositions remaining sufficiently objective to consider alternative “reasonable” explanations for the evidence they were being asked to admit.

Many of them proved inadequate to that task, and their inadequacies were effectively overlooked by a Court of Appeal which, in a subsequent series of cases,<sup>673</sup> seemed to consider that nothing more was required of propensity evidence than that it support the Crown’s case in some general way, *regardless of whatever specific issue of fact the evidence might be said to be relevant to*. This was a far cry indeed from what the High Court in *Pfennig* had intended, and in *Phillips*,<sup>674</sup> the High Court first confirmed,<sup>675</sup> that “Since at least 1995, it has generally been thought that that the admissibility of similar fact evidence depends on the test stated in *Pfennig*”, before noting that both the trial judge and trial counsel had agreed that the trial judge should apply “a reformulation of that test as stated by Thomas JA in . . . *O’Keefe*”.

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<sup>673</sup> *R v K; Ex Parte A-G (Queensland)* (2002) 132 A Crim R 108; *R v Coonan* [2002] QCA 465; *R v McGrane* [2002] QCA 173.

<sup>674</sup> Note 653. P appealed his convictions for rape, unlawful carnal knowledge and assault with intent to rape, involving five separate complainants on six separate occasions. The point of law before the High Court involved the alleged error of law involved in the repeated refusals by the trial judge to allow separation of the trials, decisions which had been condoned by the Queensland Court of Appeal. The Crown had not fully eliminated the possibility of collusion between the complainants.

<sup>675</sup> At 308.

The test in *O'Keefe* had been adopted by the Queensland Court of Appeal because it had considered that the *Pfennig* test was “unworkable” and “had a dubious pedigree”. The unanimous High Court responded to this by asserting that:<sup>676</sup>

. . . it is for *this Court alone* to determine whether one of its previous decisions is to be departed from or overruled . . . . *Pfennig v The Queen* . . . . [requires] the judge to *exclude* the evidence if, viewed in the context and way just described, there is a reasonable view of the evidence which is consistent with innocence. The tests advanced in *O'Keefe* are expressed differently. Because they are expressed differently it cannot be assumed that in every case they would operate identically to the tests expressed in *Pfennig* . . . .Intermediate and trial courts must continue to apply *Pfennig*. (emphasis added; footnotes omitted).

Intermediate and trial courts seem to have followed this edict in those states and territories in which appropriate cases have arisen since *Phillips*.<sup>677</sup> *Phillips*, with its insistence on the continuing authority of the *Pfennig* test, has attracted academic criticism.<sup>678</sup> But criticism has not been confined to academics; the *Pfennig* test has also been rejected by some of the common law world's most senior law-makers.

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<sup>676</sup> At 322-4.

<sup>677</sup> For subsequent Queensland cases, see *R v MAP* [2006] QCA 220, per Keane JA at [43] to [45], *R v KP; ex parte A-G (Qld)* [2006] QCA 301, per Holmes JA at [56], *R v Kay* [2006] QCA 302 and *R v Pretorius* (Note 601). The most recent case in that state, at the time of writing, to acknowledge the authority of *Phillips* was *R v Brown* [2011] QCA 16. Similarly, the courts of South Australia – which had not sought to avoid the strictness of the *Pfennig* test – were soon observed paying due regard to *Phillips* in their application of the law to the facts; see, for example, *Sweeney* [2008] SASC 300 at [23], Bleby J in *R v Wallace* (2008) 100 SASR 119 at 126, *R v Ellis* (2010) 199 A Crim R 249, per Sulan J at 260, *SHN* [2010] SASFC 74 and *R v Dawson-Ryan* (2009) 104 SASR 571. The only remaining jurisdiction within Australia which is, in theory at least, subject to the *Pfennig* test, and its reassertion by the High Court in *Phillips*, is the Northern Territory. At the time of writing, *Phillips* appears not to have been cited or referred to in any subsequent case within that jurisdiction. But even in Victoria, following the coming into force of its version of the Uniform Laws, the Court of Appeal in *Michael Wilson v R* (note 618) felt constrained to follow *Phillips* on the inadmissibility, on a multi-count trial for sexual assaults, of evidence of non-consent by the alleged victims.

<sup>678</sup> See, for example, Gans, “Similar facts after Phillips”, (2006) 30 Crim LJ 224. Gans claims (at 238) that, in *Phillips*, “Arguably, the [Queensland] Court of Appeal, far from ‘ignoring’ *Pfennig*, gave the majority’s reasons more attention than they probably ever received from their authors.” Gans concludes

*Authoritative rejections of the Pfennig test*

Even among those members of the High Court in *Pfennig* who first formulated the test, there had been one expression of guarded reluctance to impose such a strict threshold of admissibility in all cases, by McHugh J,<sup>679</sup> who had also,<sup>680</sup> pointed out the impracticality of a so-called test for admissibility which ruled out all but the most extreme forms of probity, and then in effect took the decision out of the hands of both the trial judge and the jury.

In Canada, as emerges in Chapter 9, the full Supreme Court, in *Handy*<sup>681</sup>, opted for the ‘prejudicial effect versus probative value’ approach, and rejected *Pfennig*,<sup>682</sup> on the ground that “ . . . the ‘conclusiveness’ test takes the trial judge’s ‘gatekeeper’ function too far into the domain of the trier of fact”. *Pfennig* suffered a similar rejection by the English House of Lords in *DPP v H.*<sup>683</sup> Lord Mustill, having considered *Pfennig*, concluded that:<sup>684</sup>

. . . . the function of the trial judge is not to decide as an intellectual process whether the evidence satisfies prescribed conditions, but to strike . . . a balance between the probative value of the similar fact evidence and its potentially damaging effect.

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(at 242) that “ . . . significant problems remain in the application of *Pfennig*, presumably including whatever problems the High Court’s remarks in *Phillips* were intended to clarify.”

<sup>679</sup> Most notably at 529, where his Honour had continued to argue for a sliding scale of probity against prejudice, and had reserved the requirement for the highest level of probity for cases in which “ . . . the risk of an unfair trial is very high”.

<sup>680</sup> At 516. This criticism of the *Pfennig* test was repeated by his Honour in *Melbourne v The Queen* (1999) 198 CLR 1, at 17. In *KRM v The Queen*, (note 600), he questioned whether or not the *Pfennig* test had been intended to apply to *all* propensity evidence, pointing to ambiguities in terminology employed by the majority Court which had left the matter uncertain.

<sup>681</sup> [2002] 2 SCR 908.

<sup>682</sup> At [97].

<sup>683</sup> Note 294.

<sup>684</sup> At 621.



The *Pfennig* test fared no better when it was considered by the English Law Commission in its final Report on “Evidence of Bad Character in Criminal Proceedings” in October 2001.<sup>685</sup> It recommended against the adoption of the *Pfennig* test because.<sup>686</sup>

We thought the test stricter than necessary, and likely to lead to the exclusion of evidence which was probative and of little prejudicial effect. . . . it would require the judge to apply the same test to the evidence as the jury would have to apply, if it were admitted. . . . The test in *Pfennig* is not necessarily appropriate for bad character evidence of a different kind from that in issue in *Pfennig*: . . . we think wrongful acquittals would result from setting the test so high, and we do not favour the consequences for the judge’s role and the trial process which would follow from it.

The English Law Commission was not the only reforming body to give *Pfennig* the thumbs down, and what must be regarded as the most telling rejection of the High Court’s test came from much closer to home. At almost exactly the same time that the *Pfennig* formula appeared in the law reports, the Australian Law Reform Commission recommended a continuing reliance on the “probity versus prejudice” approach. From the perspective of Australian lawyers, this only added to the confusion.

The final assessment of *Pfennig* must be that it only suggested a *possible* (and largely unworkable) formula for the admission of propensity evidence at what might be termed ‘the high end’ of probative value. It had done so in the context of particularly compelling similar fact evidence, but had done nothing to enlighten trial judges faced with future requests by the Crown for the admission of either “relationship” or “identity” evidence, whatever that term might encompass. Even in respect of “similar fact”

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<sup>685</sup> Cm 5257. This was considered more fully at note 324.

<sup>686</sup> In Paras. 11.12 and 11.13.

evidence, it had failed to identify either those factors which make such evidence probative, or those which might lead to unfair prejudice.

For those states which were about to receive a uniform statutory alternative, *anything* must have seemed preferable to the confusion left in *Pfennig*'s wake.

### **A missed opportunity**

In 1987, the Australian Law Reform Commission ("the ALRC") generated a Report,<sup>687</sup> most of whose recommendations found their way into the *Evidence Act 1995* (Cth). This Act applied immediately in all courts of Commonwealth jurisdiction and the ACT courts, and 'mirror' legislation was thereafter enacted by the Parliaments of New South Wales, Tasmania and Victoria.<sup>688</sup> These common provisions are known collectively as "The Uniform Laws of Evidence" (hereafter "Uniform Laws").

What was described, in the Report,<sup>689</sup> as "Evidence of Character and Conduct" was the subject of only one series of recommendations among many. These recommendations contained what might have been a significant breakthrough in the philosophy underlying the admission of "propensity" evidence, had Federal Parliament adopted them. They anticipated by fifteen years an almost identical change in philosophy which was to be acknowledged under Canadian common law in *R v*

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<sup>687</sup> ALRC 38 ("Evidence"), 5<sup>th</sup> June 1987.

<sup>688</sup> For the precise timeline of these enactments, see note 578. At the time of writing, Queensland, South Australia, Western Australia and the Northern Territory are still unaffected by these Uniform Laws. Recently, in *R v Basa* [2012] SASCFC 35, the Supreme Court of South Australia was still applying the "affront to common sense" test of *Boardman* in assessing the cross-admissibility of complaints by several sexual offence victims against an accused. The Courts of Appeal of both NSW (in *Ellis*, note 677) and Tasmania (in *L v Tasmania* (2006) 15 Tas R 381) have formally acknowledged that the common law rule in *Pfennig* has been superseded by the provisions of the Uniform Laws.

<sup>689</sup> Note 687, Chapter 36.

*Handy*,<sup>690</sup> namely the recognition of those factors which make propensity evidence admissible through *relevance*.<sup>691</sup> They were:

- the nature and extent of similarities between that evidence and the fact(s) in issue;
- the extent to which the ‘act or state of mind’ of the accused is unusual;
- the number and times of similar acts; and
- the likelihood that the defendant would have repeated them<sup>692</sup>.

Not only did these recommendations reflect the true logical justification for the admissibility of propensity evidence – namely *its relevance to an issue which the court has to decide* – but they would have provided trial judges with a comprehensive set of benchmarks against which to measure the admissibility of items of evidence urged upon them by prosecutors. Unaccountably, these recommendations did not appear in the final form of the legislation. Instead, s 101 of the Uniform Laws reflected the ‘old’ approach of requiring the probative value of the proffered evidence to “substantially” outweigh its prejudicial effect.

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<sup>690</sup> Note 681.

<sup>691</sup> The ALRC recommended that any legislative provision on the subject should “specify the matters that, typically, should be taken into account”. This it did, in Clause 89(3) of its draft Bill, which was ignored in Federal Parliament.

<sup>692</sup> This latter requirement reflected the psychological research to which the Commission had referred, which concluded that offenders are more likely to repeat offending behaviour the more similar the circumstances.

Had the ALRC's original reasoning been implemented, the resulting legislation might also have avoided perpetuating the 'categories' approach. Instead, the Federal Government's legislators committed themselves to a continuation of it.

### **The Uniform legislation in outline**

The Uniform Laws on the admission of propensity evidence are identically worded across the jurisdictions,<sup>693</sup> and may be provisionally identified as follows:

*Section 97:* The "tendency rule"

*Section 98* The "coincidence rule"

*Section 99* Requirements for notice

*Section 100* Judicial dispensation with notice requirements

*Section 101* Further restrictions on the use of tendency and coincidence evidence by the prosecution

These provisions differ significantly from the common law, in that:

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<sup>693</sup> For ease of reference in the remainder of this chapter, citations are of sections of the Commonwealth Act; any relevant points of difference between Acts are noted as appropriate.

- (a) Whereas the common law treats “propensity” as indivisible, the Uniform Laws distinguish between evidence which reveals “tendency” and that which discloses “coincidence”.<sup>694</sup>
- (b) The party seeking to adduce either “tendency” or “coincidence” evidence must give written notice to the other in advance of the trial, unless this requirement is dispensed with by the trial judge.
- (c) All “propensity” or “coincidence” evidence must be of “significant” probative value in order to be admissible.<sup>695</sup> However, before such evidence may be adduced by the Crown against an accused, the probative value of that evidence must “substantially outweigh” any prejudicial effect it may have. This seems to steer a middle course between the bare ‘probity versus prejudice’ test of *Boardman*, and the stricter ‘no reasonable alternative hypothesis’ test laid down in *Pfennig*,<sup>696</sup> in the same year that the Uniform Laws came into force.

The legislation has created considerable case-law. Much of this was, arguably, unnecessary. The bulk of it arose from both a failure to properly define each ‘category’, and uncertainty over which category might apply in which situation. There were also potentially three different *degrees* of probative value which had to be attained by any challenged item of evidence in a criminal case. This did nothing to simplify the task of trial judges, while the requirement for notice to be given to a criminal accused turned out to be illusory.

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<sup>694</sup> As noted by Ligertwood and Edmond, *Australian Evidence*, 5<sup>th</sup> ed, LexisNexis Butterworths, Australia, 2010), p. 163, “The legislation gives no guidance as to the reason for the distinction”. Nor is any guidance provided in ALRC 38 (note 687).

<sup>695</sup> The sections were drafted so as to apply in both civil *and* criminal cases.

<sup>696</sup> Note 564.

## Duelling categories

The ALRC gave no reason for distinguishing between “coincidence” (s 98) and “tendency” (s 97), and the existence of these two notionally distinct categories has caused confusion at their factual interface.<sup>697</sup> This was not alleviated in any way by s 95, which provides that evidence which is inadmissible for a particular purpose may not be employed for that purpose even if admitted for some *other* purpose. As a result, evidence which is admissible as “coincidence” should not be used in order to prove “tendency”, if it is inadmissible for that purpose. Not only does this perpetuate and encourage a ‘categories’ approach, but s 95 proved to be unworkable in practice, once judges began to demonstrate an inability to distinguish between the two notional concepts, and began ruling that propensity evidence might be admitted under *both* s 97 and s 98.<sup>698</sup>

If trial judges cannot be relied upon to distinguish between “coincidence” and “tendency” evidence, then there is little hope that juries can be prevented from combining elements of both, and concluding, by circular reasoning, that the accused’s *tendency* may be corroborated by the *coincidence* of the similarities, while, at the same time, the *coincidence* is all the more remarkable given the accused’s *tendency*, which the victims could not have known about unless they had experienced it. There is also the risk, despite s 95, that the jury will be allowed, under s 98, to hear evidence which they then employ for a “tendency” purpose because they have received no warning against doing so.

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<sup>697</sup> The Dictionary to the Uniform Laws proves unhelpful, defining “tendency” evidence as “. . . evidence of a kind referred to in subsection 97(1)”, and “coincidence evidence” simply as evidence which it is sought to adduce under s 98.

<sup>698</sup> See, for example, *R v Colby* [1999] NSWCCA 261, *State of Tasmania v Y* (2007) 178 A Crim R 481, *R v Ellis* (note 677), *R v Mason* [2003] NSWCCA 331, and *SPA v R* [2011] VSCA 306. In fairness to them, they are not assisted by Crown counsel; as Rothman J observed, in *R v SK* [2011] NSWCCA 292, at [51], “. . . often a notice of tendency evidence is drafted in a way which makes it difficult to determine whether the evidence is sought to be adduced as tendency evidence or similar fact/coincidence evidence”.

Considerations such as these challenge the advisability of sub-dividing similar fact evidence into categories. There is also the attendant risk of ‘category shopping’ by Crown Counsel, given the requirement of s 98(2) of the original legislation that there be a “striking similarity” of both “events” *and* “circumstances” before evidence might be admitted under the “coincidence” category. For the first decade of the Uniform Laws’ operation, Crown Counsel attempted to avoid this high threshold by seeking leave to proceed under *both* s 97 and s 98, taking advantage of judicial uncertainty regarding which section to apply. Ten years later, following ALRC Report 102,<sup>699</sup> s 98(2) was abandoned.

The DPPs of the various jurisdictions also proved themselves incapable of identifying which section they were intending to proceed under when issuing the “reasonable notice in writing” to the other party which each section required. Trial judges were, under s 100, given the discretionary power to dispense with notice requirements entirely, on whatever conditions they deemed fit, *even after the commencement of the trial*. These broad discretionary powers were used at least once in order to allow the Crown to retrieve the situation after serving a notice under the wrong section.<sup>700</sup>

### **Defining “tendency”**

The word “tendency” was a departure from common law terminology, and appears to have emerged when the Commission consulted the Concise Oxford

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<sup>699</sup> “Uniform Evidence Law” (13 February 2006). In 11.24, the ALRC conceded that “. . . to require both a striking similarity of events and a striking similarity of circumstances would be to raise the threshold too high and would be likely to exclude highly probative evidence”.

<sup>700</sup> *R v Teyes* (2001) 119 A Crim R 398, an ACT case. However, in the later ACT case of *R v King* [2012] ACTSC 176, the trial judge declined to allow the Crown to adduce evidence of K’s alleged sexual abuse of several victims under either s 97 (to prove his abuse of his position as a sports coach) or s 98 (to prove the commission of the offences through the similarity of each allegation) on the ground that it was not relevant to any live issue in the case, K having admitted the acts and based his defence on “consent”.

Dictionary for the meaning of “propensity”.<sup>701</sup> Subsequent case-law has demonstrated that “tendency” is apt to encompass *all* types of behavioural trait possessed by an accused other than that giving rise to “coincidence” reasoning.<sup>702</sup>

Read literally, s 97(1) only imposes conditions on the admission of tendency evidence which is adduced to prove that tendency *directly*. The question then arises as to whether or not the conditions of s 97 have to be satisfied if the evidence is being admitted for some *other* purpose which *indirectly* discloses the accused’s “tendency”. It is tempting for the Crown to argue that such evidence is admissible for some purpose *other than* proving “tendency”, and as they had done with *Pfennig*, they focused their attention on (a) “relationship” evidence in all its forms, and (b) evidence which is alleged to form part of the *res gestae*

#### *a) Relationship evidence*

Both in *Harriman*,<sup>703</sup> and in *Pfennig*,<sup>704</sup> the High Court had acknowledged that in some contexts at common law, “relationship” *can* constitute a form of propensity evidence, but it remained to be seen whether or not “relationship” could constitute “tendency” for the purposes of s 97. The Crown’s campaign to avoid s 97 in this way began with “uncharged acts”,<sup>705</sup> between an accused and their victim (most commonly a child alleging sexual malpractice), and in *R v AH*,<sup>706</sup> the NSW Supreme Court distinguished between the use of uncharged act evidence to prove the sexual desire of

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<sup>701</sup> It is therein defined as “inclination or tendency”.

<sup>702</sup> In *R v Colby* (note 698) it was even held to extend to previous acts by an accused which were not in themselves “illegal or reprehensible”, but were sexually “outrageous” (per Mason P at [93]), and therefore likely to lead to “moral prejudice” against him. The potential scope of “tendency” has recently been expanded in *R v Johnston* (2012) 6 ACTLR 297 and *R v Edwin* [2013] ACTSC 6 by rulings that the behaviour cited need not itself be “similar in nature” to that alleged in the instant trial.

<sup>703</sup> Note 6.

<sup>704</sup> Note 564.

<sup>705</sup> For the meaning attributed to this term, see p. 188.

<sup>706</sup> (1997) 98 A Crim R 71 at 77.



the accused for the victim (which had to pass through the “tendency” provisions of s 97), and its use simply to place the victim’s evidence in its full “context”, which did not.

*AH* was followed in subsequent cases,<sup>707</sup> then in *R v NKS*,<sup>708</sup> the Crown succeeded in having admitted, simply as “corroboration” of the evidence of the victim, and without recourse to s 97, the evidence of a psychiatrist to whom the accused had admitted sexual activity with the victim. The limits of non-tendency “context” evidence were extended even further in *Leonard v R*,<sup>709</sup> and clearly there was a danger of the ‘context’ argument becoming a regular ploy by Crown Counsel seeking to avoid the provisions of s 97.<sup>710</sup>

Writing at approximately this period,<sup>711</sup> Odgers warned that:

It should not be good enough to assert that the evidence is relied on to show the “surrounding circumstances” or “background” to the alleged offence, without a clear articulation of the precise way in which the evidence is relevant.<sup>712</sup>

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<sup>707</sup> *R v Greenham* [1999] NSWCCA 8, *R v ATM* [2000] NSWCCA 475 and *R v TAB* [2002] NSWCCA 274.

<sup>708</sup> [2004] NSWCCA 144. Similar rulings were handed down in *Rolfe v R* (2007) 173 A Crim R 168, *R v OGD (No. 2)* (2000) 50 NSWLR 433 and *R v Grattan* [2005] NSWCCA 306.

<sup>709</sup> (2006) 164 A Crim R 374. In this case, an alleged distinction was drawn between previous acts by an accused which demonstrated their “motive” to commit the offence on the indictment (held not to be “tendency” evidence), and previous acts used to demonstrate their *willingness to act* on that motive, which *was* regarded as “tendency” evidence which was required to be admitted under s 97. *Quare* whether this is a distinction without a difference, given the use which a jury is likely to make of such evidence.

<sup>710</sup> For further examples of this process, see *R v Fordham* (1997) 98 A Crim R 359, *R v Dann* [2000] NSWCCA 185 and *R v Marsh* [2000] NSWCCA 370. In *R v RJ* [2011] NSWDC 158, which involved a series of allegations of sexual abuse by the accused of his daughter, the trial judge declined to allow “uncharged act” evidence to be admitted under s 97, because the Crown had not served the requisite notice on the accused until two weeks before his arraignment, but on the authority of *HML* (note 609), the same evidence was deemed admissible in order to “. . . explain a lack of contemporaneous complaint . . . to establish that the occasions [on the indictment] . . . were not isolated incidents”.

<sup>711</sup> In *Uniform Evidence Law*, 4<sup>th</sup> ed (2000), LBC Information Services, Sydney, p. 231.

<sup>712</sup> The same sentiment was expressed in the judgment of McClellan CJ in *Qualtieri v The Queen* (2006) 171 A Crim R 463. His Honour handed down a similar ruling in *DJV v R* (note 618).

With respect, there is force in these observations. The very existence of s 97 is predicated on the knowledge, born of experience, that a jury which is informed (for *whatever* reason) that the person on trial has in the past demonstrated a “tendency” to behave in the way in which they are now accused of behaving will be more likely to convict. Hence the need for the safeguards built into s 97. A jury is no less likely to convict if it receives the same information for an ostensibly different purpose. Odgers was also highlighting the significance of *relevance*, as opposed to mere categorisation.

This Crown tactic shows no sign of abating,<sup>713</sup> and has in fact been successfully extended to violent relationships,<sup>714</sup> and relationships between alleged co-accused.<sup>715</sup> It seems that the Uniform Laws have been no more effective than the common law in preventing the perpetuation of artificial distinctions in the area of ‘relationship’ evidence.<sup>716</sup>

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<sup>713</sup> See *Galvin v The Queen* (2006) 161 A Crim R 449, and *KTR v R* [2010] NSWCCA 271. In the latter, the distinction between “context” and “tendency” evidence was said (at [92]) to be that context evidence “allow[s] the complainant’s and/or the accused’s evidence to be seen in context”, while tendency evidence “directly informs a judgment as to whether the offence with which an accused has been charged actually occurred.” There is an equally persuasive argument that “context” evidence ‘indirectly informs’ such a judgment, regardless of what directions the judge gives to the jury.

<sup>714</sup> In *R v Clark* (2001) 123 A Crim R 506, the NSW Court of Criminal Appeal condoned the admission, at C’s trial for murdering his wife, of evidence of the background of “tension and violence” in the relationship because (at 575) it was “. . . capable of casting light on whether the appellant killed the deceased, and, if he killed the deceased, what his mental state was.” Section 97 specifically governs evidence which shows an accused to “have a particular state of mind”, but not once in the ninety-six pages of judgment is there a single reference to s 97. See also *R v El-Hayek* [2004] NSWCCA 25 and *Kaifoto v R* [2006] NSWCCA 186.

<sup>715</sup> In *Quach* (2002) 137 A Crim R 354, the NSW Court of Criminal Appeal held (at [39]) that evidence disclosing prior drug dealings between two men had been admitted to show merely the nature of their relationship, and not to prove a “tendency”. See also *R v Sukkar* [2005] NSWCCA 54.

<sup>716</sup> In effect, the jury in such cases is to be told “You may not use this evidence in order to conclude that the accused is a person given to this sort of behaviour, but you *may* use it in order to conclude that they *have* behaved in a similar manner in the past in relation to this particular person.” When that ‘particular person’ is either an alleged victim, or an alleged co-accused, this would seem to be a distinction without a difference. The evidence is being admitted without regard to its *relevance*, solely on the basis that it ‘ticks a box’ of admissibility.

b) *Res gestae*

In one of the first cases to come before the NSW Court of Criminal Appeal involving *res gestae* evidence in the context of “tendency”,<sup>717</sup> it was able to fall back on the general common law principle which had been laid down in *R v O’Leary*,<sup>718</sup> namely that the evidence in question should not be excluded if, without it, “. . . the transaction of which the [crime on the indictment] formed an integral part could not be truly understood . . .”. In dismissing the appeal, and relying on the common law position, the unanimous Court held that “We do not consider that the principle in *O’Leary* has been abolished by the *Evidence Act*.”<sup>719</sup> Put another way, that s 97 could not be used to justify the *exclusion* of such evidence, even if it is prejudicial to an accused.

Odgers,<sup>720</sup> says of this approach that “It is difficult to see how this does not involve tendency reasoning”, and it might also be said to have in common with *Clark*,<sup>721</sup> that it was really evidence of the accused’s ongoing “state of mind”.

*Adam*, *O’Leary*, and even *Martin v Osbourne*,<sup>722</sup> were cited in the more recent decision in *Samadi and Djait v R*,<sup>723</sup> in which so-called *res gestae* evidence was admitted by the trial judge because it revealed “the state of mind” of the accused,

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<sup>717</sup> *Adam* (1999) 106 A Crim R 510. This ruling was followed in *R v Lamb and Thurston* [2002] NSWSC 323 again citing the *O’Leary* principle. See also *R v Kassoua* [1999] NSWCCA 13. Given that the incident in this last case occurred a week prior to the event on trial, it is difficult to see how it may be so easily be categorised as “evidence of conduct which forms part of a relevant transaction”.

<sup>718</sup> Note 631, per Dixon J at 577.

<sup>719</sup> At 515.

<sup>720</sup> Note 711, p.232, fn 466. He was referring specifically to the decision in *Kassoua*, which categorised, as part of “the continuity of circumstances which led to a later completed crime”, what appeared to have been a ‘dress rehearsal’ for an armed robbery.

<sup>721</sup> Note 714.

<sup>722</sup> Note 561.

<sup>723</sup> [2008] NSWCCA 330. The two men were charged with raping their victim after spiking her drink, and evidence was admitted to show that they had spiked the drinks of a further twelve victims during the same six day period in order to steal from them. For a further case in which “state of mind” evidence was passed off as part of the *res gestae*, see *FDP v R* (2008) 192 A Crim R 87.

without reference to the need for the provisions of s 97 to be invoked. However, the Court also ruled,<sup>724</sup> that the similarities between the circumstances of each charge were such that the “coincidence rule” of s 98 had rightly been applied. This only further blurs the distinction between “tendency” (which incorporates “state of mind”) and “coincidence”. It also further obscures the boundaries between *res gestae* evidence (which escapes both s 97 and s 98), and an event which is so closely bound up as part of “a series of events” that it requires to be considered as “coincidence” evidence. Finally, it illustrates yet again the perils of the ‘categories’ approach.

If nothing else, experience of the operation of s 97 has re-emphasised what had been obvious to both Lord Herschell in *Makin*, and the House of Lords in *Boardman*. This is that *the potential misuse of “propensity” evidence cannot be avoided simply by allocating it to one of a series of boxes which seek to categorise aspects of human behaviour whose boundaries defy precise allocation*. Instead, one must consider *the factual relevance of the previous events to the new allegations*.

As Ligertwood and Edmond put it:<sup>725</sup>

. . . There are fine inferential distinctions to be drawn in considering whether in logic evidence is relevant on account of an inference from tendency. The distinctions require clear articulation, first of the issue to be established, and second of the evidence to be tendered.

Crown Counsel faced with s 97 had proved themselves more than a match for judicial uncertainty regarding where to draw the line, and apprehension of withholding relevant evidence from a jury.

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<sup>724</sup> At [96].

<sup>725</sup> Note 694, at 175 and 177.

In 2004, the Federal Attorney-General commissioned, from the ALRC, a review of the operation of the Uniform Laws. Its Final Report,<sup>726</sup> submitted in 2006, recommended,<sup>727</sup> that “no change should be made to the definition of tendency evidence in s 97”. As noted above, ‘tendency’ evidence was barely defined under s 97 anyway, and experience had demonstrated yet again that a ‘categorisation’ approach will not resolve a problem whose origins lie in a failure to distinguish between different *reasons* for ‘relevance’.

### **Coincidence – or lack of it?**

As indicated above, the ALRC came unwittingly close to their own “intellectual breakthrough” when they recognised that one way in which an accused’s past behaviour might be relevant is *in order to eliminate coincidence*. As the Canadian Supreme Court was to demonstrate, a decade later in *Handy*, it is possible to solve the conundrum of ‘probity versus prejudice’ *entirely on the basis of relevance which defies coincidence*. However, for the time being the ALRC had been content to regard “coincidence” (when in fact, strictly speaking, they meant ‘*lack of coincidence*’) as simply one category of admissible propensity evidence.

Instinctively, it seems, the ALRC grasped that the closer the ‘fit’ between what has gone before, and what is alleged on the indictment, the more ‘probative’ is the evidence of what went before. This may well have been why, in its original form, an additional s 98(2) imposed the requirement that in order to qualify under the section, the “two or more events” which gave rise to an allegation of “coincidence” must be “substantially and relevantly similar” in nature, and occur in “circumstances” which

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<sup>726</sup> See note 699.

<sup>727</sup> In para. 11.11.

were “substantially similar”.<sup>728</sup> This original suggested test was almost immediately criticised<sup>729</sup> on the ground that “. . . it unnecessarily complicates what should be the straightforward application of logical analysis and should be removed from the Act”.

Once again the legislators appeared not to have appreciated that, by enacting what was intended to be an exclusionary rule in terms which allowed prejudicial evidence to be admitted only if certain conditions were met, they were encouraging prosecutors to ‘split hairs’ in order to justify the admission of prejudicial evidence on some *other* basis. The stricter the admissibility conditions, the greater the temptation to give the desired evidence another label and consign it to a different ‘category’.

A paradigm case for the use of s 98 arose in *R v Folbigg*,<sup>730</sup> a case which had strong echoes of *Makin*. F was charged with the homicide of her four children on the same indictment, and when her application for separation of trials was rejected by the trial judge, she appealed that decision. The Crown had given notice under both s 97 and s 98,<sup>731</sup> but it was F’s contention that in respect of each of the charges, the evidence relating to the others was not admissible under either section. The Court of Criminal Appeal ruled that it was in fact admissible under s 98, for the reason given by Hodgson JA regarding:<sup>732</sup>

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<sup>728</sup> This itself was a dilution of the ALRC’s original proposal that the *circumstances* of each of these events should also be “*substantially and relevantly similar*” (see ALRC 38, note 687, Appendix A, s 88 – emphasis added). This was interpreted by Odgers (note 711, p.223) as an attempt to impose a requirement of “striking similarity” before coincidence evidence might be employed in support of a conviction.

<sup>729</sup> Odgers, *ibid*. With respect, a truly strict “application of logical analysis” would disclose that *lack of coincidence* is what makes this type of evidence relevant, and therefore admissible. The main thrust of Odger’s criticism was that such a strict test for what should be allowed in under s 98 would result in a greater number of ‘unrelated event’ items of evidence being admitted *outside* the protective shield of the section, and the related requirement of s 101 that the probative value of such evidence substantially outweigh its prejudicial effect.

<sup>730</sup> [2003] NSWCCA 17.

<sup>731</sup> This is further confirmation of the confusing potential overlap between the two sections, and of the failure of Crown Counsel to appreciate the essential nature of “coincidence” evidence.

<sup>732</sup> At [32], the remaining two judges concurring.

. . . . the extreme improbability of four such deaths . . . occurring to children in the immediate care of their mother, with asphyxiation being a substantial possibility and no other cause of death being anything more than a substantial possibility, without the mother having contributed to any of those deaths . . . .

*Folbigg* remains the only reported case in which *true* ‘coincidence’ led to a conviction under s 98. The true meaning of “coincidence”, in this context, was not even defined in the legislation. This has assisted in the circumvention of what was originally intended to be a stringent set of admission requirements.

### *Crown circumvention of s 98*

As with s 97, the wording of s 98 suggested that “coincidence” evidence was only to be classified as such when it was intended to be used *directly* in eliminating coincidence and demonstrating guilt. It was not long before difficulties arose as to what precisely constituted “coincidence” evidence which did not go *directly* to the proof of guilt, but had that effect *indirectly*.

One obvious distinction was between “coincidence” and “circumstantial link”,<sup>733</sup> and the Crown won an early victory in *R v Merritt*.<sup>734</sup> While the persuasive nature of circumstantial evidence of this type can hardly be denied, an obvious danger arises

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<sup>733</sup> Take, for example, the factual scenario of *Glascott v R* [2011] VSCA 109, in which G was convicted of the murder of R, which the Crown alleged had occurred when R disturbed G in the process of attempting to burn down R’s office. It was held on appeal that there had been no need for the trial judge to administer a propensity warning to the jury regarding the (uncharged) attempted arson, because (at [21]), “The Crown’s case throughout was that the arsonist and the killer were one”.

<sup>734</sup> [1999] NSWCCA 29. M was on trial for his alleged part in an armed robbery, during the course of which one of the robbers had been shot. The evidence of alleged gunshot scars on M’s body was held on appeal not to be the sort of “coincidence” evidence encompassed by s 98. It might therefore be admitted without reference to s 98. Also excluded from the safeguards of s 98, in *R v Ngo* [2003] NSWCCA 82, at [330], was what were described as “ . . . events in the nature of preparatory activity leading to the commission of the subject offence”. N.B. the similarity of approach with that taken in *Kassoua* (Note 717).

when the “circumstance” in question takes the form of another crime committed by an accused. It is then all too easy to fall into ‘circular reasoning’, and that danger is most acute in cases in which a jury is invited to consider the highly distinctive and almost identical descriptions of events given by two allegedly independent complainants,<sup>735</sup> and to reason from these that D must have committed both offences because the details are so consistent.

It is the inherent unlikelihood of two or more people at random making the same detailed complaint which justifies the conclusion of ‘lack of coincidence’, and the consequential admission of the evidence under s 98. Unless this factor is kept firmly in mind when using the evidence of two or more complainants as cross-corroborative, then there is a risk of circular reasoning by which the alleged occurrence of incident A is made more credible by the alleged occurrence of incident B, and vice-versa. It is not the similarity in events which is the ‘coincidence’, but *the fact that two victims independently describe such similarities*.<sup>736</sup> It is therefore imperative that prosecutors are not allowed to circumvent the safeguards supplied by s 98 for the admission of such evidence by applying a different label to the evidence they seek to have admitted.

At common law, this type of evidence had never been classified as “coincidence” evidence; instead, in cases such as *Phillips*,<sup>737</sup> it had been met head-on, and admitted, as “propensity” evidence. When faced with the same type of evidence under a statutory scheme, it was only to be expected that practitioners would think of it as falling into the category of “tendency” evidence under s 97, rather than it being classified as a form of “coincidence” evidence under s 98. The distinction is important, particularly since, under the Uniform Laws, such evidence need only demonstrate “similarities” in the events described before it will be admissible as “coincidence” evidence under s 98,

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<sup>735</sup> The risk of collusion in such cases makes the process even more hazardous.

<sup>736</sup> Strictly speaking, such evidence is not “coincidence” evidence at all, unless and until the accused is confirmed beyond reasonable doubt as the perpetrator of at least one incident, which may then be compared with a second or more such incidents. The form of “coincidence” being relied upon when two or more complainants describe an accused’s behaviour in similar terms goes towards proving the accused to be the offender, which, because of its highly prejudicial nature, calls for vigilant judicial supervision.

<sup>737</sup> Note 653.



whereas, as the High Court had firmly re-emphasised in *Phillips*, “striking similarity” was required in order to prove “propensity” at common law.<sup>738</sup>

Despite this need for clarification, when the ALRC was asked to review the first ten years of operation of the Uniform Laws, its only gesture towards clarification was to blankly refute the suggestion that there might be some ambiguity over whether or not one of the “events” referred to in the section could include the event which was the subject of the new charge. The Commission was clearly of the opinion that it could, and a note was added to s 98 putting the matter beyond doubt. This note appears not to have been included in the *Evidence Act 2001* (Tas), but the applicability of s 98 to events alleged at trial was impliedly acknowledged in *Wallis v Tasmania*,<sup>739</sup> in which all the “events” being considered (a series of burglaries) were represented on the indictment.

### **The requirement for “significant probative value”**

Before evidence may be admitted under either s 97 or s 98, it must be shown to possess “significant probative value”. Nowhere in the legislation is this phrase defined, although the Dictionary defines “probative value” as:

. . . the extent to which the evidence could rationally affect the assessment of the probability of a fact in issue”.<sup>740</sup>

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<sup>738</sup> This tendency to devalue the potential prejudice of “coincidence” evidence was confirmed judicially in *WRC* ((2002) 130 A Crim R 89), in which Hodgson JA reminded the courts below him (at 102) that under the Uniform Laws, “material [which is] not sufficient for tendency evidence, which must depend only upon objective fact, rather than upon two or more persons giving similar stories, . . . may be sufficient for coincidence evidence.”

<sup>739</sup> [2007] TASSC 4.

<sup>740</sup> This is consistent with the definition of “relevance” to be found in s 55 of the legislation.

The ALRC,<sup>741</sup> had proposed “to continue the requirement of substantial probative value”. The Commonwealth Parliamentary draftsman in fact substituted “significant” for “substantial”, leaving subsequent courts to conjecture whether the two adjectives were synonymous, or whether a new test had been legislated.

Self-evidently, the probative value of any item of evidence will be *its degree of relevance to a material fact in issue*, and it is obviously difficult to generalise about a measure of factual significance which will vary from one case scenario to another. However, the courts soon found themselves attempting this task.

In *R v Lockyer*,<sup>742</sup> Hunt CJ,<sup>743</sup> observed that:

... “significant” probative value must mean something more than mere relevance but something less than a “substantial” degree of relevance. . . . One of the primary meanings of . . . “significant” is “important”, or “of consequence”. In my opinion, that is the sense in which it is used in s 97. . . .the significance of the probative value of the tendency evidence . . . must depend upon the nature of the fact in issue to which it is

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<sup>741</sup> In its Interim Report 26 (“Evidence”, 21<sup>st</sup> August 1985), in para. 810. In para. 806, it had recommended the phrase “similarities which ensure the earlier acts or states of mind are *capable of significantly affecting the probabilities*” (emphasis added). *Pfennig* was yet to come at the time this was written.

<sup>742</sup> (1996) 89 A Crim R 457. This definition was followed in *R v Mahmoud Hawi* [2011] NSWSC 1663.

<sup>743</sup> At 459. His Honour was able to adopt his own definition of “significant” a year later in *R v Lock* (1997) 91 A Crim R 334, at 361. His Honour’s interpretation was also adopted, in its application to both s 97 and s 98, by the NSW Court of Criminal Appeal in *R v Martin* [2000] NSWCCA 332 (per Ireland JA at [67]). See also *R v Fordham* (note 710), and *R v Ford* (2009) 210 A Crim R 451, a NSW case in which Campbell JA (at [50]) observed that “significant probative value” involved proof of the probability of a fact in issue “to a high degree”. *Ford* was followed in the more recent ACT cases of *R v Johnston* [2012] ACTSC 89 and *R v Fitzpatrick* [2012] ACTSC 107. There was no special reference, in *Lockyer*, to the fact that the propensity evidence in that case was being admitted against a third party *in the interests of the accused*. It is arguable that a lesser degree of probity is appropriate in such circumstances, and this point is raised again below.

relevant and the significance (or importance) which that evidence may have in establishing that fact.<sup>744</sup>

The fact that a trial judge is required to assess the “significance” of evidence to be tendered under either section, in advance of that evidence being heard, had already been emphasised in two earlier decisions of the NSW Court of Criminal Appeal.<sup>745</sup>

As had been demonstrated at common law, there are dangers in such a process, the obvious one being that the trial judge is in effect being required to act as a ‘pre-jury’, and to predict in advance what the *real* jury is likely to make of the evidence. Both s 97(1)(b) and s 98(1)(b) provide that “tendency” and “coincidence” evidence, respectively, are not admissible unless “. . . . the court thinks that the evidence *will* . . . . have significant probative value” (emphasis added).<sup>746</sup>

This places the trial judge in the position of a silent prosecutor, only marginally less omnipotent than the common law trial judge tasked with implementing the procedure foisted upon them by *Pfennig*. The Uniform Laws have clearly done nothing to avoid this dilemma.

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<sup>744</sup> The importance of defining the precise issue of fact which is to be targeted by the proposed evidence was re-emphasised fairly recently by the NSW Court of Criminal Appeal in *AW v The Queen* [2009] NSWCCA 1, in which Latham J ruled, at [47] and [48], the remaining judges concurring, that “The evidence must have significant probative value, that is, it must be *evidence that is meaningful in the context of the issues at trial*”. (emphasis added). This is another case which highlights the danger of requiring the trial judge to rule on the admissibility of contested propensity evidence ahead of that evidence being heard, and being required to double-guess what the jury will make of it.

<sup>745</sup> *R v Fletcher* (2005) 156 A Crim R 308 and *R v Zhang* (2005) 158 A Crim R 504.

<sup>746</sup> By “the court” is meant the trial judge.

A related issue is whether or not, when assessing contested evidence for its probative value, the trial judge should also assess it for its *veracity*.<sup>747</sup> There is, at the time of writing, no judicial clarification of this issue.<sup>748</sup>

Further confusion was generated by the requirement, under s 103, for evidence which is being adduced in cross-examination in order to challenge a witness's credibility to possess "*substantial* probative value". The distinction between "substantial" and "significant" was raised with the ALRC during their review of the working of the Uniform Laws, together with a suggestion that these measures of probity should be reversed.

The unconvincing response of the ALRC,<sup>749</sup> was that a higher degree of control was required over evidence which was being adduced (often, of course, by a criminal accused) in respect of "collateral" issues such as "credibility",<sup>750</sup> ". . . adding to the

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<sup>747</sup> One argument is that this is ultimately a question for the jury (see, for example, *DSJ v R*; *NS v R* [2012] NSWCCA 9, per Whealy JA at [82]). The other argument is the 'common-sense' one that if the evidence in question is untrue, then it can have no actual relevance to the matter in issue, the entire logical basis for its admission is missing, and the trial judge should exclude it.

<sup>748</sup> The closest which the courts have come at the time of writing is the unanimous decision of the NSW Court of Appeal in *DSJ v R*; *NS v R* (note 747) that in the evaluation process, the trial judge should at least consider alternative interpretations of the challenged evidence consistent with innocence. However, in the context of s 137, which requires, of *all* evidence admitted under either of ss 97 or 98, that its probative value be measured against its potential for unfair prejudice, Latham J in *R v Sood* [2007] NSWCCA 214, at [38], the remaining judges concurring, opined that ". . . the probative value of the evidence . . . is to be assessed by taking the evidence at its highest." *Sood* was followed in *Tasmania v Finnegan* [2012] TASSC 1. This implies a lack of concern regarding its *truth* at that stage in the proceedings, a conclusion confirmed by the NSW Court of Criminal Appeal in *R v Shamouil* (2006) 66 NSWLR 229 to the effect that the probative value of evidence adduced under either of ss 97 or 98 must be assessed on the basis that it will be accepted as true. This was followed in *KMJ v Tasmania* [2011] TASSCCA 7, but in *Tasmania v W* [2012] TASSC 47, this was held not to preclude the trial judge from assessing the credibility of a sexual assault complainant in relation to alleged concoction or contamination. The law in this area is clearly unresolved and inconsistent.

<sup>749</sup> In para.11.50 of ALRC 102 (note 699).

<sup>750</sup> It is submitted, with respect, that any restriction on the right to impugn a witness's "credibility" is misconceived, since, as is pointed out by Odgers (note 711, at 239), ". . . evidence relating to the credibility of the witness will indirectly affect the assessment of the probability of the existence of the fact in issue". For this reason, at common law, it is only the "credit" of a witness (being their reputation or character, as opposed to their 'believability') which is subjected to the "collateral issues" restraint.

time and cost of proceedings”.<sup>751</sup> By contrast, it asserted, “tendency” and “coincidence” evidence is “relevant to the facts in issue, and a lower preliminary threshold is warranted”. It did not explain how, or why.<sup>752</sup>

After ten years of the legislation in operation, and despite the difficulties identified above, the ALRC concluded that:<sup>753</sup>

. . . . the meanings of ‘significant probative value’ and ‘substantial probative value’ have been construed appropriately and are reasonably clear . . . . No changes are proposed in the use of the expressions.

### **Additional issues**

The Uniform Laws contain additional shortfalls in effective policy.

#### *Section 101*

This section provides that *in addition to* the “significant probative value” which propensity evidence must possess before it may be admitted under either of ss 97 or 98,

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<sup>751</sup> It did not enhance the intellectual credentials of the Uniform Laws that they appeared to have been drafted on economic grounds.

<sup>752</sup> One might also challenge the assertion that the credibility of a witness is not “relevant” to the fact in issue to which they are testifying. Presumably the Commission was referring to “direct”, as opposed to “indirect”, relevance.

<sup>753</sup> Report 102 (note 699), para.11.51.

it may not be employed against a criminal accused unless and until that probative value “*substantially* outweighs any prejudicial effect it may have” on that accused.<sup>754</sup>

There were obvious problems with this definition. The first was the extent to which “substantial” probity was required to exceed the “significant” probity already required under ss 97 and 98. It was natural for courts seeking to apply the provision to look to the common law for answers, particularly since the ALRC,<sup>755</sup> claimed to have adopted “the orthodox view”. Only after the full implications of, and doubts relating to, *Pfennig* came to the fore did a different viewpoint prevail.

The case-law immediately after the enactment of the legislation – most prominently that in the NSW Court of Criminal Appeal – therefore tended to follow the common law in its search for probative value which “substantially” outweighed prejudicial effect. The result of so doing was, inevitably, to import into the statutory scheme all the problems and conflicts of judicial opinion which were currently besetting the common law regime.<sup>756</sup>

But there was an alternative view,<sup>757</sup> to the effect that the common law should not be blindly followed, and it was left to the High Court in *Papakosmos v R*,<sup>758</sup> to rule that the Uniform Laws should be interpreted in accordance with their own language, and

<sup>754</sup> Emphasis added. In *BP v R* [2010] NSWCCA 330, at [109], it was held that “prejudice” in this context involved “. . . some irrational, emotional or illogical response” by the jury. This definition was followed in *Tasmania v W (No 2)* [2012] TASSC 48. This additional degree of probity is not, however, required when the evidence being adduced by the Crown is in rebuttal of “tendency” or “coincidence” evidence adduced by the accused. In such situations, it will be sufficient for the evidence in question to possess only “significant” probative value, per ss 97 and 98. This is at least consistent with *Lockyer* (note 742), in which it was held that tendency evidence adduced by the accused need only satisfy this standard.

<sup>755</sup> See note 687.

<sup>756</sup> See, for example *R v Lock* (note 743), per Hunt CJ at 363, and *R v Colby* (note 698), in both of which the appropriate level of probity was said to be that laid down for common law cases in *Pfennig*. See also Hodgson JA in *R v WRC* (note 738), at 101, *R v Joiner* (2002) 133 A Crim R 90 at 97-8, and *R v Folbigg* (Note 730) at [27] and [28].

<sup>757</sup> See the Full Federal Court ruling in *Conway v R* (2000) 98 FCR 204 at 233 and 234, and the judgments of Miles and Madgwick JJ. in *W v R* (2001) 189 ALR 633, at [53] and [101] respectively.

<sup>758</sup> (1999) 196 CLR 297.

not that of the common law. In *R v Ellis*,<sup>759</sup> a five-member Bench of the NSW Court of Criminal Appeal followed this lead, and re-established a simple balancing test which would enable all cases under ss 97 and 98 to be determined according to the weight of the evidence for and against admission, and not subject to the *Pfennig* test. However, this was only partly successful, due to the complications arising under s 137.

### *Section 137*

This section mandates another balancing exercise, for criminal cases only, in the following terms:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The obvious dilemma facing subsequent courts was how far, if at all, this level of probity was required to fall below the level of “substantial” probative value mandated under s 101, or the “significant” level of probity prescribed by ss 97 and 98. Nor is this the only problem created by the existence of s 137. It also introduces a *third* hurdle for propensity evidence which the Crown seeks to have admitted against an accused. Not only must it possess “significant” probative value under ss 97 and 98, and not only must that probative value “substantially outweigh” any “prejudicial” effect it might have on an accused in terms of s 101, but under s 137 it must also be demonstrated that its probative value “outweighs” the risk of “unfair” prejudice to the accused.

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<sup>759</sup> Note 677.

Several definitional issues arise from all of this, none of which appear to have been resolved by subsequent case-law. The first is whether or not the “unfair” prejudice referred to in s 137 is *the same as* the “prejudicial effect” described in s 101.<sup>760</sup> The simplest way through this thicket of tests would seem to be to focus on s 101, and ensure that any such evidence possesses a probative value which “substantially” outweighs any “prejudicial” effect likely to result in an “unfair” trial.<sup>761</sup>

The only feasible alternative would seem to be to run the evidence in question through what Ligertwood and Edmond,<sup>762</sup> describe as “. . . a legislative continuum from ‘probative’ to ‘significant probative value’ and then to probative weight ‘substantially outweighing’ prejudice . . . .”, before finally deciding whether or not the admission of such evidence would operate ‘unfairly’.<sup>763</sup> This is yet another issue arising under the Uniform Laws which currently awaits resolution.

### “She’ll be right”

Ten years after the enactment of the Uniform Laws, the ALRC was taxed with reviewing their operation, and recommending any changes which it felt were necessary following the experience of almost a decade. In ALRC Report 102, dated February 2006, it came down firmly in favour of the *status quo*, and criticised the confusion and

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<sup>760</sup> If so, then one or other of these provisions would seem to be superfluous. If not, then the inescapable inference is that the “prejudice” contemplated in s 101 is somehow *not* “unfair”.

<sup>761</sup> The problem with this approach is two-fold. First of all, it tends to reduce ss 97/98 and s 137 to the status of pious irrelevances. Secondly, it results in the entire statutory regime under the Uniform Laws adding merely one word (“substantial”) to the common law test laid down in *Boardman* and *DPP v P*. At least it avoids *Pfennig*.

<sup>762</sup> Note 694, at p.181.

<sup>763</sup> One may readily imagine an item of evidence whose probative value is “significant”, but which does not “substantially” outweigh its prejudicial effect. It will clear the hurdles of ss 97 and 98, but not s 101, and will therefore be inadmissible. Even if it clears the hurdle of s 101, s 137 still has to be surmounted, and at this point the frustrated Crown Counsel is likely to argue along the lines that “If it is substantially more probative than prejudicial, how can it then be ‘unfair’ to admit it?” For an example of a trial judge conducting the balancing exercise required by s 137, partly in favour of the Crown, and partly in favour of the accused, see *R v Marsh* [2011] NSWSC 1687.



uncertainty of the *Pfennig* common law alternative. It also reported,<sup>764</sup> that “. . . the level of concern of some appears to have been affected by experience . . . in the period when the *Hoch/Pfennig* principle was treated as applicable under [the Uniform Laws].”

<sup>765</sup>

One would have found this criticism of *Pfennig* more convincing had the Uniform Laws offered a more effective and workable alternative.

## Conclusion

It is tempting to write off the *Pfennig* test as an unworkable and extreme formula which will only be appropriate in cases of its limited type, and will lead to injustice in the majority of attempts to apply it. While this is true, in those cases in which it is appropriate the court is recognising, and giving effect to, a most powerful justification for the admission of propensity evidence against an accused faced with new charges – namely that to ignore such evidence would be an affront to common sense and a recipe for injustice to the victim(s).

*Pfennig* was simply the last – if an unfortunately excessive – application of an alternative analysis of what had occurred in *Makin*. Australia had been offered an alternative by one of its own courts, but had mishandled it. In the New South Wales Court of Appeal judgment in *Makin*, and in the High Court’s application of it in *Martin v Osbourne*, may be found an alternative jurisprudence, based on *logical relevance* rather than categorisation. It was unfortunate, to say the least, that *Pfennig* was allowed

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<sup>764</sup> Para.11.84.

<sup>765</sup> It was arguably no legitimate answer to the criticisms levelled at the statutory regime simply to blame the common law alternative.

to become a general rule, rather than an exemplar of logical relevance at the ‘high end’ of probative value.

It was perhaps inevitable, in view of the terms of reference given to the ALRC, that it would proceed from the existing English common law base, that is, without knowing what was to happen in *Pfennig*. In the process, it incorporated most of underlying assumptions of the English common law as at that date, and replicated its fundamental errors in statutory form. In particular, it opted to continue with what amounted to a ‘categories’ approach under another name.

There was still no recognition (by the legislators at least) of the importance of the factual ‘fit’ between proven propensity and fresh allegation, *regardless of category*.

Instead of a statement of broad principle based on the importance of allowing a jury to hear evidence which is highly relevant to the decision which they have to make, while at the same time ensuring that they do not employ it for an *irrelevant* purpose, the ALRC had followed a formula which was over a century old in common law terms; a formula which had failed wherever it had been introduced.

## Chapter 7:

### Scots law on similar fact evidence

#### Chapter synopsis

The law of Scotland, in its treatment of similar fact evidence, was allowed to develop without direct reference to the *Makin* principles. In consequence, it avoided the ‘categories’ approach which plagued English case-law. In turn, this obviated any need for an “intellectual breakthrough” such as was found necessary in *Boardman*. Nor has it led to any complex legislation designed to ensure that juries receive ‘the whole truth’ regarding an alleged offender.<sup>766</sup>

What makes Scots law of particular relevance to this thesis is its focus on *relevance* as the basis for the admission of similar fact evidence from an accused person’s past in trials in respect of new crimes. As such, Scots law on similar fact evidence provides a valuable “control” study for comparison with the policy-driven statutory mire which has threatened to engulf English and American law. It also serves to highlight the missed chances under other regimes.

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<sup>766</sup> Since 1999, Scotland has once again enjoyed its own Parliament for the first time since the uniting of the English and Scots Parliaments in 1707. Despite that political joinder, Scots law has always remained distinct and separate from its English counterpart, operating within its own jurisdiction, with only a selective and piecemeal statutory overlay dictated by Westminster in respect of matters (such as income tax and defence) which are essentially federal in nature. Scots criminal law, and its law of evidence, remain unique.

## Similar fact evidence generally

The current role of similar fact evidence under Scots law is well encapsulated in the following extract from the judgment of the High Court of Justiciary,<sup>767</sup> in *Nelson v H.M. Advocate*:<sup>768</sup>

The Crown can lead any evidence relevant to the proof of a crime charged, even although it may show or tend to show the commission of another crime not charged, unless fair notice requires that the other crime should be charged or otherwise referred to expressly in the complaint<sup>769</sup> or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character, and that crime is so different in time, place or character from the crime charged that the libel<sup>770</sup> does not give fair notice to the accused that evidence relating to that other crime may be led; or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime.

As this quotation reveals, the controls imposed on the use of similar fact evidence under Scots law owe as much to the need to give “fair notice” to the accused of what the Crown intends to allege against them as they do to any perceived inherent unfairness or prejudice in the use of such evidence. The reason for this may be found in the history of how Scots criminal law has developed.

The requirement for “fair notice” dates back in Scots law to at least the middle years of the Nineteenth Century, and well before *Makin*. It was highlighted in two

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<sup>767</sup> This is Scotland’s highest court of appeal.

<sup>768</sup> 1994 J.C. 94, at 104C.

<sup>769</sup> A “complaint” is the formal document used by the Crown to specify the offence alleged against an accused person when the matter is proceeding summarily.

<sup>770</sup> “Libel” is the word used in Scots law to describe the allegation against an accused.

leading cases of that era, *H.M. Advocate v Pritchard*,<sup>771</sup> and *H.M. Advocate v Monson*.<sup>772</sup>

The infamous Dr. Pritchard was on trial for the alleged murder by poisoning of his wife. Evidence was led by the Crown from one of his domestic servants to the effect that she had become pregnant by him, and had miscarried. There was apparently no objection from defence counsel to this line of evidence until the Crown attempted to elicit from the same witness the additional evidence that the accused had supplied her with the necessary abortifacient. This objection was upheld, on the ground that there had been no reference in the indictment to the allegation that the accused had procured the girl's abortion. It had clearly not occurred to defence counsel to object to the prejudicial nature of the allegation that his client had seduced a servant girl. It was explained in the later case of *Monson* that:<sup>773</sup>

. . . . it was held competent to ask a witness whether the prisoner had been having relations of improper intimacy with his female servant, that not being a matter which could have been made the subject of a criminal charge, and *being one which might be proved as an incidental fact tending to establish motive*, but when it was further proposed to ask the question whether the prisoner . . . had used means to procure premature delivery, that was not allowed. That was a suggestion of crime, and crime with which the prisoner might have been charged in the indictment, thus giving him notice that he had to meet that charge . . . The question of the undue familiarity had to do with the question that was being tried. The question of the prisoner having tried to get rid of the consequence of that intimacy could have had nothing to do with it except to throw suspicion upon him as regards the charge upon which he was brought to the bar – *suggesting that if he could do the one thing he might do the other* – and the court disallowed it. (emphasis added)

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<sup>771</sup> (1865) 5 Irv. 88.

<sup>772</sup> (1893) 21 R.(J.) 5.

<sup>773</sup> Note 772, at pp.7-8, per Lord Justice-Clerk MacDonald.

It would seem from this statement that ‘bad character’ evidence was admissible on the issue of motive,<sup>774</sup> but inadmissible if it was being employed as ‘forbidden reasoning’ or ‘reasoning prejudice’ along the lines of ‘A man who is capable of procuring an abortion to serve his own ends is capable of poisoning his wife for the same reason’. However, what was seen as equally important was the fact that the accused had not been put on notice that this alleged additional crime by him was to be raised in evidence. The question which remained unanswered was whether or not the abortifacient evidence would have been admissible had the accused been adequately put on notice of it by way of its inclusion in the indictment.<sup>775</sup>

In *Monson*, M was charged with the murder of an estate owner, and it was alleged, as part of the ‘background facts’ to the murder, that he had forged a lease. No notice had been given of any forgery allegation in the indictment, and defence counsel objected to any evidence being led regarding it. In sustaining that objection, Lord Justice-Clerk MacDonald referred to *Pritchard* before adding:<sup>776</sup>

If it was thought of sufficient importance in this case to prove that this document . . . was a forgery, then that might have been done by making a charge of forgery . . . If the charge had been made, the prisoner . . . would have made all preparation to meet it, but . . . it is impossible . . . at this stage competently to bring forward evidence to meet it.

There was again no reference to the possibility that the evidence might also be inadmissible because it cast aspersions on the character of the accused which might be employed prejudicially by the jury to conclude that he was capable of murder. Instead,

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<sup>774</sup> As such, it was of course relevant to the issue of his possible guilt. In a modern court, it might be explained away as being part of the “background facts” leading to the alleged offence.

<sup>775</sup> Indictments in Scottish criminal cases are of the “narrative” type, and include a relatively detailed set of allegations regarding the accused’s behaviour.

<sup>776</sup> At 7.

the main concern of the Court, as in *Pritchard*, appears to have been that the accused had not received fair notice of what was to be alleged against him.

This line of reasoning continued well into the next century. In *Griffen v H.M. Advocate*,<sup>777</sup> for example, Lord Justice-Clerk Aitchison observed that:

I should be sorry if the rule laid down . . . in *Monson's* case were in any way weakened. But then it may often happen in the course of a trial that facts may emerge that by themselves might have formed the subject of a criminal charge, or that may suggest to the jury that some other crime may have been committed by the [accused]. The mere fact that this may happen is no reason for excluding the evidence, provided always fair notice has been given in the indictment so that the [accused] is made fully aware of the case he has to meet, *and provided also that the evidence is strictly relevant to the substantive charge.* [emphasis added]

The relevance of the additional criminal behaviour which was being alleged was only one factor in the admissibility equation. “Fair notice” to the accused appeared to be equally important. It was not being suggested that the mere prejudiciality of such evidence rendered it inadmissible, provided that it was relevant to the case in hand. But one may find reported cases from this period which suggest that some eyes at least were beginning to look south, and that trial advocates and judges were beginning to take notice of the trends developing under English law.<sup>778</sup>

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<sup>777</sup> 1939 J.C.1, at 5-6. It was held in this case that a person accused of attempting to defraud a building society by purporting to be the owner of certain property had been given adequate notice of the fact that part of the Crown case against him would be evidence that he had forged and uttered the title deed to that property. This case is further considered at note 790.

<sup>778</sup> The early writers on Scots criminal law had confined themselves to noting specific contexts in which prior actions of an accused might be factually relevant to a new matter on trial, in much the same way that, as described in Chapter 2, the English courts had begun to do pre-*Makin*. Thus, for example, Hume (*Commentaries*, vol.2, 413) acknowledged that in a homicide case, the previous violent behaviour of the accused towards the victim might be admissible, while Alison (*Principles of the Criminal Law of Scotland*, 1832, reprinted 1989, vol.1, 416) said that evidence of previous attempted “utterings” by an accused might be relevant at his subsequent trial for forgery, “. . . not as substantive articles of charge,

For example, in *Gallagher v Paton*,<sup>779</sup> a sales representative was on trial for falsely pretending to a shop assistant that her employer was an annual subscriber to an advertising directory. Evidence was led of his having made similar false pretences to other people on the same day. In holding that this evidence had been rightly admitted, Lord Justice-General McLaren observed,<sup>780</sup> in terms highly reminiscent of those handed down in English cases,<sup>781</sup> that:

. . . . when the question is whether the accused person made false statements . . . for the purpose of obtaining money . . . I do not know of any better way of establishing the criminal intention than by proof that he had made similar false statements on the same day to other people, and apparently with the same object . . . . A false statement to one person may be explained away, but when a system of false statements is proved, the probability is very great that the statements were designedly made.

Put in the language of *Makin*, the possibility of the accused having made a genuine mistake in relation to a matter which was “an issue before the jury” fell in the face of evidence of the “system” in which he was engaged. Although there was no direct reference to *Makin*, or its predecessors, it was the sheer *relevance* of the similar fact evidence to what was alleged in the instant case which made it admissible. There was no consideration of any unfair prejudice which the accused might suffer in consequence. However, his Lordship did add,<sup>782</sup> that such evidence should be restricted to events which occurred “about the same time”, because “. . . if the prosecutor were allowed to prove statements made at an earlier period, this would only go to general

but in *modum probationis* of the charges of which the crime was actually completed”. But none of these writers, any more than the courts, sought to “induct” these specific examples into a broader principle, as Lord Herschell did in *Makin*.

<sup>779</sup> (1909) S.C.(J.) 50. His Lordship referred to the earlier case of *H.M. Advocate v Ritche and Morren* (1841) 2 Swin 581, in which the ground of appeal had been the alleged lack of adequate notice to the accused. The relevance of the similar fact evidence in the instant case seems to have been impliedly conceded.

<sup>780</sup> At 55.

<sup>781</sup> For example, by Lord Coleridge C.J. in *Francis* (note 94).

<sup>782</sup> *Ibid.*



character, and would not necessarily throw light on the particular act which is under consideration”. This may be seen as an instinctive distinction between the relevance of the evidence to the facts of the instant case on the one hand, and more general character assassination on the other.

Relevance also won the day over prejudice in *H.M. Advocate v Bickerstaff*,<sup>783</sup> in which the High Court deemed it appropriate to leave two counts conjoined on the same indictment. One related to an indecent assault on a 7 year old girl, and the other the indecent assault and murder of a 4 year old girl. Defence counsel argued the prejudicial potential of hearing the two charges together. This argument was rejected in the face of the perceived “closeness of the relationship – in time, circumstances and character – between the charges included in the same indictment”.<sup>784</sup>

It was to be another twenty years before the authority of *Makin* was acknowledged under Scots law, and even then only obliquely. In *H.M. Advocate v Joseph*,<sup>785</sup> Lord Murray opined that:<sup>786</sup>

. . . . I am of opinion that it is the law in Scotland, as in England, that it is open to the prosecution to prove any facts relevant to the charge, notwithstanding that they may show or tend to show the commission of another crime, if they show or tend to show that the act charged was done of design and did not arise by accident, or if they tend to rebut a defence of innocence which might otherwise be open to the [accused].

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<sup>783</sup> 1926 J.C. 65.

<sup>784</sup> At 75, per the Lord Justice-General. Both offences had occurred in the same town on the same day. Note the similarity of his Lordship’s phraseology to that employed in *Moorov* (note 787) by the same judge only four years later. The *Moorov* Doctrine may be argued to have developed as a specific application of a more general principle explained in *Bickerstaff*. See, e.g. Vandore, “The Moorov Doctrine”, (1974) 19 Juridical Review 35, 38.

<sup>785</sup> 1929 J.C. 55. In this case, J was accused of having uttered a forged loan document to a bank in Dundee in a fraudulent attempt to raise money on it, and the indictment made specific reference to a similar alleged offence involving the same document against the management of an hotel in Brussels. A preliminary objection to the “competence” of this second charge found its way to the High Court of Justiciary.

<sup>786</sup> At 56-7.

Earlier in the same cited passage, his Lordship referred to the need to show “. . . some connexion or ‘nexus’, which . . . is sufficiently intimate, between the two ‘incidents’”, and he was of the opinion that there was “ample authority” for the admissibility of evidence of other criminal behaviour “. . . if the connexion between the incident sought to be proved and the crime libelled is very close in point of time and character, so that they can hardly be dissociated”. This clearly emphasises the need to demonstrate the *relevance* of the evidence over and above the mere fact that “the incident sought to be proved” occurred.

It is the very existence of such a “nexus” which in the following year was to justify the decision in *Moorov v H.M. Advocate*,<sup>787</sup> from which a whole line of specific similar fact evidence applications was to flow. However, in respect of what might be termed the ‘mainstream’ application of similar fact evidence jurisprudence, it is the judgment in *Joseph* which is regarded, by Scots lawyers,<sup>788</sup> as representing the earliest direct application of the spirit of *Makin* to the law of Scotland, even though it contained no direct reference to Lord Herschell’s judgment.

Although some subsequent cases continued to emphasise the importance of “fair notice” to an accused of additional crimes upon which the Crown intended to rely in proof of the instant offence,<sup>789</sup> the additional need to demonstrate *relevance* to the facts of that instant case came to occupy a position of at least equal importance. This was

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<sup>787</sup> 1930 J.C. 68; 1930 S.L.T. 596.

<sup>788</sup> See, e.g. Raitt, *Evidence – Principles, Policy and Practice* (2008), W.Green and Son, Edinburgh, p.232. Professor Raitt, in “The Evidential Use of “Similar Facts” in Scots Criminal Law”, Edin. L R (2003) Vol 7, 174, 182, also expressed the opinion that “In contrast to other Commonwealth jurisdictions, the admission of similar fact evidence is relatively uncommon in Scots law”. See also *Nelson v H.M. Advocate*, note 768, at 101G, and Duff (note 820), at 155.

<sup>789</sup> See, e.g. *Cameron v Waugh* 1937 J.C. 5, and *Boyle, Petitioner* 1993 S.L.T. 1058.

particularly true in cases in which the contested evidence was being used to demonstrate a lack of innocent motive for an otherwise equivocal act.<sup>790</sup>

The importance of relevance seems, therefore, to have emerged more clearly over time, although there rarely seems, under Scots law, to have been any overt reference to the prejudice which may ensue if the jury are allowed to employ evidence of additional bad behaviour by the accused for the wrong reason.

The closest is perhaps to be found in the High Court ruling in *Nelson v H.M. Advocate*.<sup>791</sup> N was charged with supplying drugs, and evidence was led that when police raided a public house in which he was believed to be selling the drugs, and approached him with a view to searching him, N ran to the toilet and swallowed something which was believed to be a drug. He was convicted after trial, and appealed against his conviction on the ground that the evidence of what had occurred in the toilet amounted to an allegation of an additional crime (obstructing the police).<sup>792</sup> While rejecting the submission that N had not received adequate notice that this additional crime was to be proved against him,<sup>793</sup> the Court observed,<sup>794</sup> that the basis for the admissibility of the evidence was “. . . to be found in the principles of relevancy and of fair notice”, and went on to add that:<sup>795</sup>

The fact that the evidence may show or tend to show that the accused committed a crime not charged is not in itself a reason for holding the evidence to be inadmissible,

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<sup>790</sup> For example, *Griffen v H.M. Advocate*, Note 777.

<sup>791</sup> Note 768.

<sup>792</sup> In most jurisdictions, this evidence would surely be admissible either as part of the *res gestae* of the drug supply (see, e.g. *O’Leary v R*, note 631), or as part of the essential narrative leading up to the central facts of the case (See *Criminal Justice Act 2003* (E & W) s 101(1)(c), considered in note 366).

<sup>793</sup> See note 768. The reason for this rejection was said to be that while the Crown had not set out to prove his guilt of this second crime, the facts relating to his alleged attempt to conceal the evidence had been adequately disclosed to N’s legal team as part of the general narrative relating to the crime on the indictment.

<sup>794</sup> At 100.

<sup>795</sup> At 103-4.

so long as to do so is relevant to the crime charged in the indictment. But *evidence showing or tending to show that the accused committed another crime may be prejudicial to him*. . . . There is less reason to be concerned on this point if the evidence tends merely to show incidentally that the accused may have committed an offence of a trivial or technical nature from which no inference could be drawn that he was of bad character. But if it is necessary for the Crown to go to the length of establishing that the accused was in fact guilty of another crime, as part of the evidence relating to the crime charged, fair notice requires that this should be distinctly libelled in the complaint or indictment. (emphasis added).

Clearly, even in those situations in which there may be substantial potential prejudice to an accused from the disclosure to a jury of their previous misconduct, the Court was primarily concerned with the need to ensure that fair notice had been given to that accused of the Crown's intention to adduce such evidence.

The Scottish High Court continues to down-value the prejudicial nature of similar fact evidence even in those cases in which the risk of both "reasoning" and "moral" prejudice by the jury is at its highest.<sup>796</sup> For example, in *H.M. Advocate v Beggs (No 3)*,<sup>797</sup> B was convicted of the sexual assault and murder of a male victim. The Crown was allowed to lead evidence of his practice of picking up males from "straight" public houses, plying them with drink at his home and sexually molesting them. The trial judge allowed the evidence in, after opining that this highly prejudicial evidence " . . . at best . . . might demonstrate only a propensity on the part of the accused to engage in homosexual sexual activity", and as such might be used as part of the Crown's circumstantial case against the accused. His Lordship was clearly downplaying the prejudicial effect of the disclosure to the jury of B's homosexual

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<sup>796</sup> For the meaning of these terms, see notes 336 and 337.

<sup>797</sup> 2001 SCCR 891. This is the most recent case on the subject at the time of writing.

preferences, and asserting their relevance, despite the rejection of precisely the same assertion by the House of Lords in *Boardman*,<sup>798</sup> a quarter of a century earlier.

The Scottish courts clearly concentrate on the *relevance* of similar fact evidence as an element of a Crown case, insisting merely on the procedural nicety of adequately warning the accused of what is to be alleged against them. The result has been a complete absence of any need, under Scots law, to balance probative value against prejudicial effect.

Relevance is also the key factor in the most fully developed application of similar fact evidence under Scots law, the so-called “Moorov Doctrine”.

### **The Moorov Doctrine**

In order to understand the role played by what has become known as “The Moorov Doctrine” in Scottish criminal jurisprudence, one has to be conversant with the general procedural rule which requires “corroboration” before any person may be convicted of any crime in a Scots court. The most commonly quoted formulation of this rule is to be found in the judgment of Lord Justice-Clerk Aitchison in *Morton v H.M. Advocate*,<sup>799</sup> that:

. . . no person can be convicted of a crime . . . unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime . . . with which he is charged.

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<sup>798</sup> Note 235.

<sup>799</sup> 1938 J.C. 50.

While this requirement has never been taken literally, so as to require the testimony of two eye-witnesses to the alleged crime,<sup>800</sup> it was long asserted by the “institutional writers” in Scots law,<sup>801</sup> that the necessary corroboration might be found in the testimony of a witness recounting another, near identical, piece of behaviour by the same identified accused. This form of “mutual corroboration” is similar fact evidence in its purest form. It proceeds, via “coincidence reasoning”,<sup>802</sup> to support the allegation of offending on the occasion on trial (which might otherwise be held to be uncorroborated because of the absence of a second source of evidence, independent of the testimony of the victim).

The most obvious scenarios in which this is of value involve sexual offences, which by their very nature often have no witness other than the victim, and which in the absence of supporting forensic evidence might well never result in a conviction. This was the context in which the High Court laid down the “Moorov Doctrine”.

In *Moorov v H.M. Advocate*,<sup>803</sup> M was charged with a series of sexual assaults against female employees over a four year period. Corroboration of the conventional variety existed only in respect of three of these charges. In respect of a further thirteen of them there was only the evidence of the alleged victim. M was convicted of all of these thirteen charges, on the basis that the evidence of each victim corroborated that of the other victims whose evidence required corroboration. In the course of rejecting M’s

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<sup>800</sup> Rather, it has required two independent *sources* of evidence, whatever form they may take. In *Patterson v Nixon*, 1960 J.C. 42, for example, the corroborating evidence took the form of the behaviour of a police tracker dog, while in *Nisbet v H.M. Advocate*, 1983 S.C.C.R. 13 it took the form of the “awkward story” told by N to police who suspected him of receiving stolen property, and who asked him to account for his possession of the property in question.

<sup>801</sup> See, e.g. Hume, *Crimes*, II, 385, Alison, *Practice of the Criminal Law in Scotland* (1833), II, 552, and Dickson, *A Treatise on the Law of Evidence in Scotland* (Grierson’s edition), paras. 1807-1810.

<sup>802</sup> The “coincidence” in question is the unlikelihood that two or more independent witnesses might invent the same factually specific allegation. The risk of “collusion” which has bedevilled English cases of this type seems not to have arisen under this Doctrine, probably because in the majority of the decided cases the witnesses did not have any prior relationship with each other.

<sup>803</sup> Note 787. This was the first ruling on the admissibility of similar fact evidence, of any type, by the then newly-established Court of Appeal in Scotland.

appeal against conviction, Lord Justice-General Clyde,<sup>804</sup> laid down the pre-conditions for the admission of this type of evidence in the following terms:

. . . before the evidence of a single credible witness to separate acts can provide material for mutual corroboration, the connection between the separate acts (indicated by *their external relation in time, character or circumstance*) must be such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign or adventure which lies beyond or behind – but is related to – the separate acts. (emphasis added).

Put in terms of English law, they reveal “a course of similar conduct”. In terms also recognisable to anyone familiar with the way in which English law had subsequently developed, his Lordship underlined the need for a strong degree of similarity to exist between the various incidents:<sup>805</sup>

. . . I think the reason why identity of kind should be a *sine qua non* of the establishment of any recognisable connection or relation between the separate acts is to be found in the necessity of giving a wide berth to any possible risk of allowing a jury to be tempted into the course of “giving a dog a bad name and hanging him”.

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<sup>804</sup> At 599. Lord Sands (at 608) described the logic involved more economically as being that “There must be some special circumstances connecting the incidents in order that it may be held that a course of conduct is established”. The Lord Advocate, for the Crown, had cited *Makin* in support of his successful submission, at 597, that “The test of whether evidence in one crime was admissible as evidence in another was whether it was relevant”. Lord Alness (note 787, J.C. at 82) agreed that “. . . the incidents proved disclose a systematic course of libidinous conduct on the part of the appellant – a scheme or design or plan on his part to gratify his lewd impulses, at the expense of his unfortunate employees, whenever and wherever he thought that a safe opportunity of so doing presented itself”. However, his opinion that the Court was dealing with “a special case unlikely ever to recur” proved to be unduly optimistic.

<sup>805</sup> *Ibid.*

*Moorov* was cited with approval by the House of Lords in *DPP v Kilbourne*,<sup>806</sup> during the course of which, in reaching an identical decision to the effect that the evidence of various alleged victims of an accused's sexual depredations might be used to corroborate that of the others, Lord Hailsham observed:<sup>807</sup>

That this is so in the law of Scotland seems beyond dispute, and it would be astonishing if the law of England were different in this respect, since one would hope that the same rules of logic and common sense are common to both.

Although Lord Clyde's judgment in *Moorov* emphasised the desirability of similarity in "time, character and circumstance", in practice these elements have proved to be interchangeable, in the sense that great strength in one can offset relative weakness in the others. For example, in *Coffey v Houston*,<sup>808</sup> a time gap of slightly over two years between two alleged sexual assaults by a male nurse on two 11 year old girls under his care in separate hospitals was not fatal to a conviction, given the bizarre nature of his behaviour and the identical detail of the assaults testified to by each of the girls. By contrast, in *H.M. Advocate v Cox*,<sup>809</sup> a time gap of three years was said to be too long between two alleged assaults against two of C's step-children within the family home when one offence was sodomy and the other was incest.

The precise nature of the alleged behaviour can be important, as the *Cox* case illustrates. So also can the order in which the corroborating evidence is organised. For

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<sup>806</sup> Note 194. It was also subsequently approved by Lord Morris in *Boardman* (note 235) at 440.

<sup>807</sup> At 742.

<sup>808</sup> 1992 S.C.C.R. 265. See also *Dodds v H.M. Advocate*, 2002 S.L.T. 1058 and *Stewart v H.M. Advocate*, 2007 S.C.C.R. 303.

<sup>809</sup> 1962 J.C. 27. However, more recently in *K v H.M. Advocate* 2012 J.C. 74, the High Court held that a time gap of eleven years did not invalidate the cross-admissibility of the evidence of M (sexually abused for a period of years ending in 1995) and the evidence of D (sexually abused for a period beginning in 2008), when the two victims were the accused's nephews, they were approximately the same age at the time of the abuse, the abuse occurred at the same locations, and the accused told D, while abusing him for the first time, "I've missed you, M". On appeal, this last factor was said to constitute the "extraordinary feature" which linked the two testimonies.



example, in *H.M. Advocate v Brown*,<sup>810</sup> B was accused, by each of his three step-daughters, of having committed both indecent assaults and incest against them, during a 21 month period in which only a matter of months separated the end of a course of conduct with one girl and the start of the next. It was held that in the circumstances the time period was short enough to fit within the Moorov Doctrine, and that the evidence of incest might be used to corroborate the allegations of indecent assaults (but not the other way around), because “The greater here includes the lesser”.<sup>811</sup>

Although most frequently employed in sexual assault cases, the Moorov Doctrine has also proved efficacious in respect of other types of offence. In *McCudden v H.M. Advocate*,<sup>812</sup> for example, it was used in respect of two separate attempts to bribe soccer players. In *H.M. Advocate v McQuade*,<sup>813</sup> the charges involved razor attacks. Nor are either the technical nature of, or name given to, the charges necessarily crucial, if the factual incidents being corroborated are essentially near-identical. Thus, in *Austin v Fraser*,<sup>814</sup> the Doctrine was applied in respect of a breach of the peace and the careless driving of a motor vehicle, both of which incidents involved driving a car so as to impede the progress of another motorist.

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<sup>810</sup> 1970 S.L.T. 121.

<sup>811</sup> Per Lord Justice-Clerk Grant at 122. See also *Hutchison v H.M. Advocate*, 1998 S.L.T. 679, in which it was held that an assault could corroborate a breach of the peace, but not vice-versa. It is respectfully submitted that if relevance is the key, then the gravity of each offence should not be regarded as significant.

<sup>812</sup> 1952 J.C. 86.

<sup>813</sup> 1951 J.C. 143. See also *Harris v Clark* 1958 J.C. 3, in which it was applied to three separate offences of receiving stolen property (called “reset” under Scots law), in which the evidence identifying the accused as the receiver came from the three separate thieves, who all worked in the same wholesale warehouse from which the items were stolen.

<sup>814</sup> 1998 S.L.T. 106. See also *Hughes (Graham) v H. M. Advocate* 2008 J.C. 338, in which it was held that the Doctrine could be applied so as to link more traditional acts of sexual abuse with an allegation of striking a child on the bare buttocks with a belt, which in the circumstances could be regarded as a species of indecent assault. Both victims were pre-pubescent siblings, all the offences had occurred in the accused’s bedroom, and they were closely linked in time. Also *Carpenter v Hamilton* 1994 S.C.C.R. 108, in which breach of the peace and indecent exposure were said to possess an “underlying similarity”.

The significance of the Moorov Doctrine is that it allows *relevance* to play its natural role in the process of fact-finding,<sup>815</sup> without allowing it to be immersed in policy-driven concerns regarding the ‘category’ into which it may be placed, or to be compared artificially with whatever potential “prejudice” may be said to attend the admission of that evidence. The Doctrine can only apply when new offences are being tried for the first time,<sup>816</sup> which results in the jury always being able to assess the demeanour of each of the witnesses testifying to each alleged similar fact incident during the course of the same trial. In addition, it was held in *Lord Advocate’s Reference (No.1 of 2001)*,<sup>817</sup> that the Doctrine may not be employed unless the accused can be clearly identified as the culprit in each of the incidents relied upon by the Crown.

As Lord Justice-General Hope explained in *Reynolds v H.M. Advocate*,<sup>818</sup>

. . . . . cases of this kind, while they must be approached with care, raise questions of fact and degree. That is especially so where . . . the case falls into the open country which lies between the two extremes. . . . Where the case lies in the middle ground, the important point is that a jury should be properly directed so that they may be aware of the test which requires to be applied . . . . When . . . regard is had to the fact that there are *items in the evidence which may on one view be regarded as similarities and then balanced against the dissimilarities*,<sup>819</sup> we consider that this case fell within the province of the jury rather than the judge. (emphasis added)

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<sup>815</sup> In the words of Lord Wark in *Ogg v H.M. Advocate* 1938 S.L.T. 513, at 515-6, “The doctrine of *Moorov* . . . is simply one particular application of the general principle that the evidence to be regarded by the jury in each charge must be relevant to that charge”.

<sup>816</sup> *Walsh v H.M. Advocate*, 1961 J.C. 51.

<sup>817</sup> 2002 S.L.T. 466

<sup>818</sup> 1995 J.C. 142, at 146.

<sup>819</sup> As emerges in Chapter 9, the measurement of similarities against dissimilarities is the process identified by the Canadian Supreme Court in *Handy* as lying at the heart of the admissibility test for similar fact evidence.

## The consequences of the dominance of *Moorov*

The predominant lesson to be learned from the Scottish experience would seem to be that relevance may safely be allowed to speak for itself, and the only safeguard which needs to be built into the system is the giving of adequate notice to the accused. However, it may also be the case that Scots law has paid a price for placing most of its similar fact jurisprudential eggs in one basket, namely that:

. . . . the development of any nascent, broad doctrine of similar facts evidence withered because the *Moorov* doctrine came to be seen as the only manifestation of any such principle in the law of Scotland and a rather peculiar creature, originating in our distinctive rules on corroboration. . . . the role of similar facts evidence became categorised as an exception to the need for corroboration, rather than being recognised as a doctrine of much more general application and importance.<sup>820</sup>

This failure to recognise a broader role for similar fact evidence has been blamed,<sup>821</sup> for the confusion which arose in the wake of the decision of the Appeal Court in *Howden v H.M. Advocate*.<sup>822</sup> H had been convicted of two robberies in Edinburgh, in very similar circumstances, and within a two week period. With respect to the first robbery, the identification evidence was strong against H, whereas in the second it was weak. The trial judge had directed the jury that if they were satisfied “beyond doubt” that the same person had committed both robberies, then they could convict H of the second robbery. He rejected a Crown submission that the matter was covered by the *Moorov* Doctrine on the ground that this required, for its application,

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<sup>820</sup> Duff, “Towards a Unified Theory of “Similar Facts Evidence” in Scots Law: Relevance, Fairness and the Reinterpretation of *Moorov*”, 2002 J.R. 143. Duff insisted (at footnote 1) on employing the plural form to describe events from an accused’s life which are being used against them. In support of the quoted assertion, the author cites the subsequent authorities of *McHardy v H.M. Advocate*, 1982 S.C.C.R. 582, *Coffey v Houston* (note 808), and *Lindsay v H.M. Advocate* 1994 S.L.T. 546.

<sup>821</sup> By Duff, note 820, at 162.

<sup>822</sup> 1994 S.C.C.R. 19.

clear identification of the accused on each occasion which was being relied upon, and was limited in its application to issues of corroboration.

The appeal against conviction was based on the argument that despite what he had said, the trial judge had in reality been applying the *Moorov* Doctrine in the absence of positive identification of H as the culprit on the second occasion. The response of the Appeal Court was to reject any suggestion that *Moorov* applied, and to regard the case instead as a straightforward one involving circumstantial evidence. The question was whether or not the same person had committed both offences. As Lord Justice-General Hope expressed it:<sup>823</sup>

The strength or otherwise of the identifications of the person who committed the offence in the bank was not of any importance in these circumstances, so long as the jury were satisfied beyond reasonable doubt by the circumstantial evidence that it was the same person who was responsible for both of them, and so long as they were satisfied beyond reasonable doubt that the appellant was the perpetrator of at least one of these offences.

With the benefit of experience of English law in this area, it may be said that this was indeed a straightforward case in which H's proven involvement in Robbery 1 could be used as evidence of his identity in Robbery 2 by way of the similar fact inferences. His actions demonstrated a *modus operandi*. But two Scottish academic commentators,<sup>824</sup> arrived at significantly different conclusions regarding the significance of the decision in *Howden*.

For Professor Gordon it “. . . represent[ed] a minor revolution in the law of evidence” in extending the range of the *Moorov* Doctrine to cases in which there is no

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<sup>823</sup> At p.124 E & F.

<sup>824</sup> Duff, note 820, at 163, and Gordon, in his commentary on *Howden* (note 822, at 25).

eye-witness identification of the perpetrator on one or more of the occasions relied upon. To Duff,<sup>825</sup> it was “. . . simply one application of a more general similar facts principle”.

Duff argued that:<sup>826</sup>

. . . the *Moorov* rule may simply represent one manifestation of a broader doctrine which revolves around the use of similar fact evidence, whatever the purpose for which it is cited.

This process had, in fact, already begun by the date of *Howden*. In *Lindsay v H.M. Advocate*,<sup>827</sup> it had been held to be sufficient for the application of the *Moorov* Doctrine that a witness came across the accused immediately after an assault and robbery in circumstances which left no room for doubt that the accused were the perpetrators, even though the witness had not witnessed the actual incident. Lord Justice-General Hope,<sup>828</sup> delivered the opinion of the Court that:

“. . . what matters as far as the *Moorov* doctrine is concerned is *the underlying unity as regards the separate acts established by the evidence of the various witnesses*. We cannot find anything in any of the statements of principle which makes it necessary that the evidence of identification of the accused in each case must be that of a single eye-witness to the crime. (emphasis added).

While on the one hand this could be described as a broadening of the previous narrow parameters of the *Moorov* principles, as argued by Professor Gordon, the portion of the judgment underlined above could equally have been taken directly from

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<sup>825</sup> Note 820, at 162

<sup>826</sup> *Ibid.*

<sup>827</sup> Note 820.

<sup>828</sup> At 549.

one of the formative authorities under English law.<sup>829</sup> This appears to owe more to the acknowledged “nexus of similarity” between the circumstances of each offence,<sup>830</sup> than to the positive identification of the accused as the perpetrators.

Lord Justice-General Clyde in *Moorov*,<sup>831</sup> had referred to the fact that:

The existence of such an underlying unity, comprehending and governing the separate acts, provides the necessary connecting link between them, and becomes a circumstance in which corroboration of the evidence of the single witnesses in support of the separate acts may be found – whether the existence of such underlying unity is established by independent evidence, or by necessary inference from the evidence of the single witnesses themselves, regarded as a whole.

In short, the justification for the application of the *Moorov* principle might be found, *either* in an underlying unity provided by several witnesses all identifying the accused in connection with the same criminal action, *or* in *some other unifying factor(s)* arising from the circumstance of each offence which required only eye-witness identification of the accused as the perpetrator of at least *one* offence in the series to link him to all of them. This was what happened in *Howden*.

The only threat which remains to the clarity of Scots law in its use of similar fact evidence is that practitioners and commentators will continue to cling to a narrow view of *Moorov*, and will reject any alternative application of it which does not comply strictly with the requirement of “one offence, one identification witness”.<sup>832</sup> This threat

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<sup>829</sup> For example *R v John Bond*, note 164, per A.T. Lawrence cited at note 167.

<sup>830</sup> These consisted of a series of robberies at knife-point of insurance agents collecting premiums in high-rise flats in the same working class tenement in the east end of Glasgow.

<sup>831</sup> Note 787, at 599.

<sup>832</sup> See, e.g. Ferguson, “Corroboration and Similar Fact Evidence”, *Scots Law Times*, 1996, 34, 339 at 340, who claims that “*Howden* . . . goes further than *Moorov* because as *Townsley* shows, it effectively relieves the Crown of leading any evidence of identity in cases where there is an inter-relationship in

became more obvious in the scramble for clarity in the judgments in *Townsley v Lees*.<sup>833</sup>

T was charged with a series of three thefts. In each of them it was alleged that she distracted an elderly victim in their garden, employing the same pretext on each occasion while an accomplice entered the house and stole from it. It was held on appeal by the High Court that there had been sufficient identification evidence in respect of the first two offences to justify the application of the *Moorov* Doctrine *inter se*<sup>834</sup>. The same principle could not be applied to the third theft, in respect of which there was no positive identification of T. T's guilt on the third charge could, however, be supported on the basis that this offence was committed in an identical way to the two thefts in which T had already been identified.

This was, of course, an identical line of reasoning to that which had been employed two years previously in *Howden*.<sup>835</sup> His Lordship made reference to *Howden*, and to the academic criticism which it had received, adding,<sup>836</sup> that “ . . . nothing . . . has caused us to think that the case was wrongly decided.”

*Howden* and *Townsley v Lees* were both classic applications of the logic and justice of admitting similar fact evidence on the basis of its *sheer relevance* to the case

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time, place and circumstances”. But it is surely this very inter-relationship which goes to prove identity, and given the known unreliability of eye-witness identification, similar fact evidence demonstrating such a close similarity between the facts of the case in doubt and the facts of the case in which there is no doubt of the identity of the offender, must be considered forensically superior. See also *Quinn v H.M. Advocate*, 1990 SLT 877, in which the High Court held that the evidence of a girl who identified Q as one of a group of three males who raped her in a particular flat could not be corroborated by proof that the accused had indecently assaulted another girl in the same flat three hours earlier.

<sup>833</sup> 1996 S.L.T. 1182.

<sup>834</sup> The effect of this ruling was of course that there was a “corroborated case” in respect of each of these first two thefts.

<sup>835</sup> Note 822.

<sup>836</sup> At 1186.

in hand, although it seems to have taken several decades for the Scottish courts to shake off the belief that it was only admissible in the type of scenario predicated in *Moorov*.

By contrast with the attention bestowed on the *probative value* of similar fact evidence under Scots law, there has been little consideration of its *potential prejudicial effect*, beyond the somewhat glib assertion by the High Court in *Reynolds*,<sup>837</sup> that it is simply a matter of the jury being given the correct instruction by the trial judge. Even in *Moorov* there had been an acknowledgement of the fact that a jury advised of an accused's previous misdeeds might "Give a dog a bad name and hang him",<sup>838</sup> and the corresponding implied need to ensure that the relevance of the evidence which was being admitted justified its admission.

As is often the case, terminology has served to obscure clarity. Duff,<sup>839</sup> asserts that:

The problem in Scotland . . . has been that the courts have sometimes obscured the basic issue by labelling as "irrelevant" testimony which they do not wish to go to the jury because of the risks of prejudice.

His proposed solution is the adoption of the *Boardman* equation,<sup>840</sup> and he suggests some sort of conceptual distinction between "relevance" and "probity". He then goes on,<sup>841</sup> to suggest the following two-stage test:

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<sup>837</sup> Note 818.

<sup>838</sup> See note 805.

<sup>839</sup> Note 820, at 166. He cites *Moorov* as one of the cases in which this fallacy was perpetuated.

<sup>840</sup> In Duff's words, *ibid*, the appropriate phrasing should be ". . . this similar facts evidence is relevant, but, in our view, its prejudicial effect outweighs its probative value". He appears to be oblivious to the fact that this formula failed dismally in England.

<sup>841</sup> Note 820, at 167.



- (1) Is the similar facts evidence relevant? If so,
- (2) Is it fair to admit it, given its probative weight and likely prejudicial effect?

In reality, there need only be one test, given that the only “probative weight” which an item of evidence is likely to possess will derive from *its degree of relevance* to the facts of the instant case. Taking the facts of *Townsley v Lees*,<sup>842</sup> as an example, what was “relevant” in respect of the third charge of theft was the fact that it was committed in virtually identical, distinctive circumstances to the first two, in which T had been identified as the perpetrator. That same “strong nexus of similarity” gave the evidence its “probative weight” in relation to the third charge. The only remaining factor which ought to require consideration was whether that “probative weight” came from the similarity between the offences, or simply the fact that T had committed two offences of the same general nature previously, and was therefore more likely than a person chosen at random to have done it a third time.

Clearly, it was not the mere *fact* that she had done it twice previously which carried the probative weight, but the fact that she had done it in such idiosyncratic circumstances. This being the case, then the risk that the jury would convict her simply because she had “previous” for that sort of offence was minimal, compared with the likelihood that they would conclude guilt from the “strikingly similarity” of the *modus operandi* of all three offences. Put in these terms, it would seem that the risk of “forbidden reasoning” can be almost eliminated if the trial judge directs the jury on *precisely* the purpose for which the evidence is being admitted, and leaves to them the decision as to whether or not it achieves that purpose.

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<sup>842</sup> Note 833.

As Duff describes the process:<sup>843</sup>

. . . whether courts admit similar facts evidence depends on a complex discretionary judgment about the appropriate balance to be struck between the probative weight of the evidence and the risk of prejudice in the unique circumstances of each individual case.

He does not, however, define “prejudice” in this context, any more than did the superior courts in England post-*Boardman*. Likewise, his implied belief that the “prejudice” involved is something which can be weighed against the “probity” of the evidence is doomed to the same fate which befell *Boardman*.

“Relevance” is clearly a conclusion which can be drawn from the congruence of the facts which constitute the similar fact evidence with the facts of the instant case; the more *specific* the similar facts are in relation to those to be found in the fresh allegations, the more “probative” they are in suggesting guilt. “Prejudice”, on the other hand, is, in this context, a *failure* to argue from this congruence, and to argue instead from the mere fact that a previous event occurred. This is what Lord Hailsham meant by “forbidden reasoning”,<sup>844</sup> and it is, in essence, a failure to recognise the true significance (through relevance) of the evidence. If a jury is properly directed around this hazard by the trial judge, and instructed to consider the evidence on the basis of its relevance to the facts of the charge(s) to which it is alleged to relate, *and on that basis alone*, then the less risk there is of “prejudice”. As Vandore puts it:<sup>845</sup>

The inference which the Crown are asking them to draw must be spelled out to them. . .

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<sup>843</sup> Note 820, at 170.

<sup>844</sup> Note 252.

<sup>845</sup> Note 784, at 194.

## Conclusion

Scots law underlines that what is clearly needed in any attempt to formulate an appropriate test for the admission of similar fact evidence is a thorough understanding of the nature and role of *relevance*. If the evidence is sufficiently relevant, it is admissible, and if it is not, then it must be excluded because of the risk of the jury employing it for some reason not arising from its relevance. This is the “prejudice” which is to be avoided, and judicial direction to the jury is the obvious mechanism to ensure that they only consider such evidence for its *proven relevance* to a fact in issue in the case before them.

While acting as gatekeepers in this regard, Scots judges have proved that it is possible to enforce a “notice” regime which leaves an accused in no doubt regarding the defence which they have to prepare. There is much which may be learned from their approach to the topic, in particular the fact that one can avoid “prejudice” to an accused *without* the need to incorporate it into unworkable and unnecessarily complex formulas, or seek to justify the admission of similar fact evidence by reference to categories.

## Chapter 8:

### New Zealand law

#### Chapter synopsis

The superior courts in New Zealand adhered closely to the English authorities, most notably *Makin*, *Boardman* and *DPP v P*. In the main, these proved sufficient until the 1990s, when the same uncertainty regarding their practical application which had dogged the English courts led to an increasing number of appeals, and the perceived need for statutory clarification.

The New Zealand Law Commission proposed legislation which became the *Evidence Act 2006* (N.Z.). Section 43 of that Act provides the first statutory declaration, anywhere in the English-based common law jurisdictions, of the factors which make propensity evidence “probative”. On the other side of the equation, it distinguishes clearly between “moral” and “reasoning” prejudice.

However, issues still remain under New Zealand law regarding how a trial judge is to employ these various factors in a meaningful direction to a jury.

### **R v Hall: a pre-*Makin* decision**

In *R v Hall*,<sup>846</sup> the New Zealand Court of Appeal was granted an early opportunity to consider the state of the English authorities to that point, and to formulate its own position ahead of what the Judicial Committee was to hand down in *Makin*. It followed the English precedents closely in ruling that the similar fact evidence would only have been admissible to prove (a) that the poisoning of C was not accidental; or (b) that the two poisonings were part of a series which formed a single transaction; or (c) that they were part of a “common design”. None of these grounds had been made out, and the jury having been told that they could use the evidence for any purpose they saw fit, the conviction was quashed. At this early stage in the development of their law, it seems, the New Zealand courts were following their English counterparts.<sup>847</sup> They maintained the same policy following *Makin*.

### **New Zealand law between *Makin* and *Boardman***

Like their common law contemporaries around the globe, the New Zealand courts were required to come to grips with the judgment of Lord Herschell in *Makin*. The New Zealand Court of Appeal, like its English counterpart, at first found it hard to ignore the precedents which had gone before. However, it recognised that *Makin* was something out of the ordinary, and was binding on New Zealand courts; ultimately,

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<sup>846</sup> (1887) 5 NZLR 93. H had been convicted of the murder of C by arsenic poisoning, following the admission of evidence that H's wife, W, had subsequently almost died from arsenic poisoning. H had been in attendance on both C and W during their illnesses, and upon H's arrest on suspicion of attempting to murder his wife, he was found to be in possession of both arsenic and a book on poisons. Arsenic was found in both W's faeces and C's exhumed corpse.

<sup>847</sup> It would seem that they did so with some judicial hand-washing, observing (at 110) that “[T]he common law must often result in what the public may regard as a failure of justice. That is not really our concern”.

*Makin* came to be seen in New Zealand, as it was in England, as validating a continuation of the ‘categories’ approach to the admission of propensity evidence.<sup>848</sup>

In the last case in this series,<sup>849</sup> the Court confirmed the general rule under New Zealand law at that time to be that propensity evidence was admissible when it was “relevant in any manner whatever to any issue before the jury”, *other than* merely showing the accused to be a person “likely to have committed the crime charged against him”.

From *R v Ratu Huihui*,<sup>850</sup> onwards, the change in admissibility reasoning which was slowly occurring in England,<sup>851</sup> and which first became apparent in *Sims*, was mirrored in the New Zealand decisions. Lord Goddard CJ had issued his judgment in *R v Sims*,<sup>852</sup> the previous year, observing that the “sensible view” of propensity evidence was that its admission was justified by *its relevance to the case*, regardless of whatever issues are raised by the accused.

By the time of *R v Crutchley*,<sup>853</sup> two years later, the New Zealand Court of Appeal was able to cite the broader test suggested by the Judicial Committee in *Noor Mohamed v R*,<sup>854</sup> acknowledging the need to take account of possible prejudice to the

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<sup>848</sup> The relevant cases were *R v Rogan* [1916] NZLR 265 (a case involving a schoolmaster accused of indecent assaults on three male pupils, each of whose evidence was allowed to cross-corroborate the others. There was also some “uncharged acts” evidence admitted), *R v Whitta* [1921] NZLR 519 (which drew heavily on *Ball and Ball* in admitting propensity evidence to rebut a defence of “innocent intent”), *R v Smythe* [1923] NZLR 519 (a similar decision in respect of two arsons), and *R v Cooper* [1923] NZLR 1237, a case eerily close, on its facts, to *Makin*, in which the Court confirmed that propensity evidence might be employed to prove the *actus reus*.

<sup>849</sup> *Cooper*, note 848.

<sup>850</sup> [1947] NZLR 581. See also *R v Reddaway* [1948] NZLR 1118.

<sup>851</sup> That is, the change from a ‘categories of exception’ basis to a ‘probity versus prejudice’ one.

<sup>852</sup> Note 203, cited at Note 206.

<sup>853</sup> [1950] NZLR 497.

<sup>854</sup> Note 204, at 370. This dealt with the need to ensure that the propensity evidence being adduced is sufficiently relevant to a material issue in the case to justify its admission, despite its prejudicial effect. The same question was said to be central to the issue raised on appeal in *R v Anderson* [1951] NZLR 439,

accused. In *R v Hare*,<sup>855</sup> the Court made frequent reference to the difference in approaches, and to some extent the conflict, between the English judgments in *Sims* and *Noor Mohamed*. In the end, the Court applied the emerging ‘probity versus prejudice’ approach of the latter, and can hardly have been surprised when *Boardman* was finally handed down some twenty years later.

### **From *Boardman* to a statutory regime**

From 1975 onwards in New Zealand, the House of Lords ruling in *Boardman*,<sup>856</sup> became what the leading academic authority in that jurisdiction<sup>857</sup> later described as “. . . the starting point for further examination of the modern law”. This opinion was shared – and no doubt partly created – by that nation’s superior courts. Thus, only a year after its handing down, *Boardman* was described in the New Zealand High Court,<sup>858</sup> as “the most compelling authority”.

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namely the identity of an abortionist. By this stage, the Court of Appeal was also able to cite some of its own previous decisions, for example those in *Rogan* (note 848), *Reddaway* (note 850) and *Crutchley* (note 853).

<sup>855</sup> [1952] NZLR 688, another case involving multiple charges of indecent behaviour by an accused, in which propensity evidence was led regarding not only “uncharged acts” evidence in respect of the two girls named on the indictment, but also a third girl who was not a complainant. The evidence was held to be admissible in order to establish the “relationship” which H had built up with each of his victims, which, on the authority of *Noor Mohamed*, was held to be “substantial” enough to justify its admission, despite its prejudicial nature.

<sup>856</sup> Note 235.

<sup>857</sup> *Cross on Evidence* 4<sup>th</sup> (N.Z.) edition, 1989, Butterworths, Wellington, at p.350.

<sup>858</sup> By Beattie J in *R v Geiringer* [1976] 2 NZLR 398, at 401. It was also described as “the leading case” by Cooke J, delivering the unanimous judgment in *R v McLean* [1978] 2 NZLR 358 at 361. In *R v Anderson* [1978] 2 NZLR 363, it was referred to by the majority court, at 370, as “. . . the leading modern authority in this notoriously difficult field”, a description repeated by Richardson J in the later case of *R v Paunovic* [1982] 1 NZLR 593, at 597. Ten years later, in *R v Hsi En Feng* [1985] 1 NZLR 222, at 224, per Cooke J, it was still being described as “. . . the landmark case of *R v Boardman*”.

There was no attempt to re-formulate what their Lordships had said in *Boardman*. Instead, the courts appeared to make every effort to apply the essential principles which had emerged from it, which were said in *R v Te One* to be that:<sup>859</sup>

. . . there are two separate questions: (i) whether the evidence in question is legally admissible, which turns on relevance; (ii) whether in the exercise of the judge's discretion the evidence, although strictly admissible,<sup>860</sup> should be excluded because its prejudicial effect outweighs its probative value.

At least in the immediate post-*Boardman* years, there seems to have been no difficulty in applying these principles in those cases which came on appeal.<sup>861</sup> By 1984, it was therefore possible to conclude,<sup>862</sup> that “ . . . the New Zealand decisions chart a reasonably clear course. As to the application of those principles, they illustrate the inherent difficulties which arise in borderline cases . . . . ”

The strictness with which the *Boardman* principles were applied preserved New Zealand from some of the errors committed in other jurisdictions. In *Phillips*,<sup>863</sup> for example, the Australian High Court had been obliged to point out that propensity evidence cannot be employed in order to prove the state of mind of a *victim*. This error was avoided by a single New Zealand Supreme Court judge,<sup>864</sup> who employed the “relevance” principle from *Boardman* in order to conclude that:

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<sup>859</sup> [1976] 2 NZLR 510, per Cooke J at 514.

<sup>860</sup> The more apt word might have been “relevant”.

<sup>861</sup> See, for example, *Geiringer*, *McLean*, and *Anderson* (all note 858). However, in *Paunovic* (also note 858), the Court re-emphasised the need to bear in mind that the admission of propensity evidence is “exceptional”, and that the jury should be carefully guided on the limited purpose for which it is admitted.

<sup>862</sup> *Principles of the Law of Evidence*, Garrow and McGechan, (7<sup>th</sup> Ed, 1984), Butterworths, at p.73. See also *R v Davis* [1980] 1 NZLR 257, at 263 per Cooke J delivering the judgment of the Court, that “ . . . common sense is not to be codified . . . The price of this approach is some uncertainty in borderline cases, but some uncertainty is inevitable with questions of relevance or degrees of relevance.”

<sup>863</sup> Note 653.

<sup>864</sup> McMullin J in *R v Holloway* [1980] 1 NZLR 315, at 320. This was a case with echoes of the Scots case of *Moorov v H.M. Advocate* (Note 787). The allegations in the instant case were by women who



If identity were in issue, it is unlikely that the admissibility of the evidence of the other women could be disputed . . . . The attitude of other women to his advances is not, in my view, relevant to the present case.

Likewise, the New Zealand courts seem to have successfully made the distinction between evidence which “has to do with the facts of the case”,<sup>865</sup> and propensity evidence which is drawn from other incidents in an accused person’s past. In *R v Katavich*,<sup>866</sup> K was charged with knowingly being involved in the management of a male-only sauna bath-house which was used for indecent homosexual acts. The Crown sought to adduce evidence that the establishment had been used in the past for such purposes in order to prove (a) that the premises were used as a ‘place of resort’ for such practices,<sup>867</sup> and (b) that K knew of these practices. As to (a), it was held,<sup>868</sup> that the evidence in question was “directly relevant” to the charge, and that with regard to (b), what had happened in the past might be evidence of K’s knowledge of the activities being conducted at the time, and was therefore admissible as similar fact evidence,<sup>869</sup> because it was “plainly relevant” to that issue.

In the years immediately preceding the New Zealand Law Commission’s 1999 Report on Evidence,<sup>870</sup> its courts were able to draw on an increasing body of their own case-law when deciding appeals. However, the principles which they applied were

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claimed to have answered advertisements for a live-in housekeeper, and then been raped following the subsequent job interview. H claimed that each act of intercourse was consensual.

<sup>865</sup> Note 486.

<sup>866</sup> [1977] 1 NZLR 436.

<sup>867</sup> This was clearly “to do with the facts” which the Crown had to prove in order to obtain a conviction.

<sup>868</sup> Per Henry J, at 437. His Honour might have added that it was part of the *actus reus* which the Crown had to prove in respect of a crime of a ‘continuing’ nature such as this.

<sup>869</sup> At 440.

<sup>870</sup> Report 55 (“Evidence – Reform of the Law”), August 1999.

those which they had inherited from *Boardman* and its successor, *DPP v P*,<sup>871</sup> and they displayed no inclination to develop any *new* principle of their own.

The main authority to which they referred was *Hsi En Feng*,<sup>872</sup> in which a clear warning had been issued by the Court of Appeal against attempting to reformulate what had been handed down in *Boardman*. In the main, the courts seem to have had no difficulty in balancing probity against prejudice, and appear to have dealt, almost in passing, with issues which had caused deeper soul-searching in both England and Australia.<sup>873</sup>

Another issue which had come to dominate Australian case-law, namely the distinction between propensity evidence and “relevant history or *res gestae*” was disposed of by the Court of Appeal in *R v Accused* with the simple observation,<sup>874</sup> that “We do not consider that it matters which description is used”. Their Honours also took the opportunity to confirm what had been said in *Huijser*, that the admission of propensity evidence is basically a matter of “common sense”, and that the “labels” which were traditionally applied to propensity evidence were “in deference to English authority”.<sup>875</sup>

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<sup>871</sup> Note 289.

<sup>872</sup> Note 858. It was referred to, and followed, in *R v Huijser* [1988] 1 NZLR 577, *R v Narain* [1988] NZLR 580, and *R v W* [1995] 1 NZLR 548. *R v Huijser* was in turn referred to, and followed, in *Narain* and *R v Accused* [1992] 2 NZLR 187.

<sup>873</sup> In *Narain*, for example, the High Court dealt expeditiously with the issue of possible collusion between complainants by describing it (at 579) as a matter “. . . that can be properly explored at trial and may be more capable of detection (if it exists) if the evidence is heard at the one trial”.

<sup>874</sup> Note 872, at 191. The evidence of the sister of an alleged victim of A’s sexual offending had been admitted as corroboration in respect of charges of which A had eventually been acquitted, and the complaint on appeal was the effect which this evidence might have had on the jury in respect of the charges on which A had been convicted.

<sup>875</sup> *Ibid.* They also took the trouble to observe that the recently-enacted *Bill of Rights Act 1990* (NZ), which mandated a “fair” trial, was not breached when propensity evidence was correctly admitted.

Nevertheless, it was possible to detect in the decisions of the New Zealand courts, by the close of the millennium, a growing belief among appeal judges that admission standards for propensity evidence were becoming dangerously slack.

The first warning appears to have been sounded in *R v O*,<sup>876</sup> in which the Court of Appeal referred to “ . . . the less restrictive attitude to admissibility which has developed in this country after *R v Hsi En Feng*.” The admission rules became more stringent following the Court of Appeal judgment in *R v M*.<sup>877</sup>

The Court in that case was obliged to overturn the conviction of M for multiple unlawful sexual dealings with his daughter over a 12 year period commencing when she was five, following the admission of the evidence of a woman who claimed that she had been subjected to sexual abuse by M when she had been staying at his home some years previously. The Crown did not specify any similarities in the mode of offending which would have given this evidence probative value, but it had been admitted by the trial judge on the basis that it tended to corroborate the allegations made by the daughter. Since the opinion of the Court, delivered by Gault J,<sup>878</sup> became the mantra for the future, it is appropriate to quote it at some length. It was that:

Nothing in *DPP v P* or the decisions since it was decided justifies the proposition that previous offending of the same general kind, without more, is probative of, and admissible to support, allegations of criminal offending. Such evidence has some

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<sup>876</sup> [1999] 1 NZLR 347. O had been convicted of the sodomy of his step-son, following the admission of evidence revealing him to be a paedophile. The convictions were overturned by the Court. See also *R v Horne* (unreported, CA 80/94, 18 July 1994, in which the Court noted that “ . . . the present atmosphere towards the admission of similar fact evidence is more relaxed than before the mid-1980s”. In *R v Fissenden* (unreported, CA 227/94, 18 March 1995 and *R v J* (unreported, CA 525/94, 24 April 1995), this relaxation was attributed to a desire to “keep in touch with common sense and responsible community opinion”. It will be recalled that a similar ‘law and order’ agenda had preceded statutory reform in England.

<sup>877</sup> [1999] 1 NZLR 315. It was recognised as the new leading case authority in both *R v Hodgson* [2000] NZCA 124 and *R v Absolum* [2002] NZCA 25.

<sup>878</sup> At 320-2.

logical relevance, but has never been considered sufficiently probative to outweigh its illegitimate prejudicial effect. . . . there must be some additional significant feature which lifts the evidence above showing only bad character or disposition to offend. . . .

There must be a sufficient factual link between the similar fact evidence and the direct evidence of the crime in question. That link is necessary to make the similar fact evidence more probative than prejudicial. . . . If the evidence is admitted, its probative force comes from that link.

## Deepening confusion

Despite the confident assertion by the New Zealand Law Commission ('the Commission') in August 1999,<sup>879</sup> that ". . . the current law is working well", there were, prior to 2006, indications at the highest judicial levels that, if anything, confusion was deepening regarding some applications of the time-honoured "probity versus prejudice" formula.

For example, New Zealand courts had encountered the same doubts as their Australian counterparts regarding whether or not it was necessary for the propensity which was being admitted to be proved beyond reasonable doubt to be that of the accused. In *R v Holtz*,<sup>880</sup> the Court of Appeal held that it was sufficient for juries to be directed that they must be "satisfied" of it before relying upon it in order to reason towards a conviction. This still left the question of whether this was to be done on an item by item basis,<sup>881</sup> or holistically, as part of an overall Crown case of which the propensity evidence is simply one item of circumstantial evidence.<sup>882</sup>

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<sup>879</sup> In para. 175 of its Report No. 55 – see Note 870.

<sup>880</sup> [2003] 1 NZLR 667, at [39].

<sup>881</sup> This was the suggested requirement laid down in *R v W* (Note 872), at 555, in which it was doubted whether a jury considering the similar accounts of an accused's sexual misconduct from several complainants in the same trial should be allowed to consider them as part of "the full picture". In *R v*

These differences of opinion, in the main, post-dated the Commission's 1999 Report, but they were symptomatic of the need for either judicial guidance at the highest level, or a legislative 'clean slate'. In Report 103,<sup>883</sup> the Commission considered that conflicting decisions such as these had been overtaken by the House of Lords ruling in *DPP v H*,<sup>884</sup> and that the newly-enacted s 43 of the *Evidence Act 2006* constituted a "fresh start".

In *R v Taunoa*,<sup>885</sup> Court of Appeal observed, of the test which had been inherited from *Boardman* and *DPP v P*,<sup>886</sup> that "At some point, either this court or the Supreme Court, will have to enunciate the test more definitively". The Court of Appeal in *R v Mokaraka* observed that:<sup>887</sup>

The real battleground is not usually relevance but the much more difficult exercise of balancing probative value against prejudicial effect.

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*Gee* [2001] 3 NZLR 729, this principle was applied so as to prevent the admission of a prior charge of which G had been acquitted, on the basis that it would not be "appropriate" to allow a new jury to reconsider whether or not G might be said to have committed that offence beyond reasonable doubt. But see *R v Degnan* [2001] 1 NZLR 280 for a contradictory ruling that same year.

<sup>882</sup> This was the preferred approach of the Court of Appeal in *R v Tulisi* (2000) 18 CRNZ 418 and *R v Sanders* [2001] 1 NZLR 257. In *R v Peyroux* [2004] NZCA, at [32], the Court of Appeal observed that "Given the contest between these two lines of cases, this is appropriately a question for a full Court."

<sup>883</sup> "Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character", May 2008.

<sup>884</sup> Note 294. In *R v Degnan* (note 881) the Court of Appeal maintained its adherence to English case authority by citing *R v Z* (note 306) for its ruling that previous charges which had resulted in an acquittal or "stay of proceedings" could still be used as propensity evidence.

<sup>885</sup> (unreported, CA 494/04, 13 April 2005). In *R v Hobbs* (unreported, CA 297/05, 20 October 2005), a differently constituted Court declined that opportunity.

<sup>886</sup> Significant variations in the suggested test may be found from the one court – the Court of Appeal – in *R v M* (note 877), *R v Mokaraka* [2002] 1 NZLR 793 and *R v Holtz* (note 880).

<sup>887</sup> Note 886, at [48]. It fell on its own sword when its use of the word "propensity" in the context of 'relevance' was criticised by a differently constituted Court in *R v Godinet* (unreported, CA 403/02, 26 June 2003), which insisted that "To be admissible, the evidence must establish something more than propensity". In *R v Potter* [2007] NZCA 156, the judicial exercise involved in applying the test was said to involve "... a finely nuanced judgement responding to the exigencies of the particular case".

The Commission,<sup>888</sup> described the ‘old’ common law test as being “ . . . at a high level of abstraction”. This reflected the need for something more than ‘mere’ propensity before the previous behaviour etc. of an accused could be admitted. The growing use of the word “propensity” to cover all forms of prior behaviour which might be relevant enough to outweigh prejudice was also adding fuel to a smouldering fire.

As the Law Commission conceded in 2008,<sup>889</sup> once it felt that these problems might have been resolved:

There were numerous appeals, with a significant number allowed. There were also complaints, particularly by District Court Judges, of difficulties in directing juries, with some mention of tell-tale “glazed expressions” . . . . At the very least there was room for conceptual clarification, simplification, and improvements in application.

### **The move towards an evidence code**

From 1997 to 2006, New Zealand went through a process which culminated in the *Evidence Act 2006*, which in the words of the Commission,<sup>890</sup> was “ . . . intended to replace most of the existing common law and statutory provisions on the admissibility and use of evidence in court proceedings”. Only part of this transition from common law to statute involved propensity evidence, but the process involved was remarkable, by comparison with what happened in England during the same period,<sup>891</sup> in meeting with little opposition, from either practitioners or academics. This was no doubt largely

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<sup>888</sup> In Report 103, (note 883), para. 2.24.

<sup>889</sup> *Ibid*, para. 2.34, 2.35.

<sup>890</sup> Report 55 (note 870), para.8.

<sup>891</sup> See, generally, Chapter 4.

because there were no radical new proposals, simply an attempt to clarify the common law that had been operating for the previous century.

For most of that period, the prevailing legislation had been the *Evidence Act 1908*.<sup>892</sup> It contained only one provision relating to the admission of propensity evidence, namely s 23, which, in cases of alleged homicide by poisoning on the part of an accused, allowed the leading of evidence to prove the administration, or attempted administration, of poison by the accused to any person at any time, on the issue of their guilt of the offence alleged on the indictment.

This unique provision did not survive the passing of the 2006 Act, and neither did the only other statutory provision permitting the admission of propensity evidence in a specific case.<sup>893</sup>

Two major Commission papers preceded the 2006 Act. They were:

Law Commission Discussion Paper on Evidence Law, Character and Credibility;<sup>894</sup>

Law Commission Report 55.<sup>895</sup>

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<sup>892</sup> This was repealed in its entirety as from 1 August 2007, when the 2006 Act came into force.

<sup>893</sup> This was s 258 of the *Crimes Act 1961*, which provided that in trials for receiving stolen property, the court might learn of previous occasions upon which the accused had been proved to be in possession of stolen property, in proof of their guilty knowledge on the instant occasion. For examples of this provision in operation, see *R v Cooke* [1990] 2 NZLR and *R v McDonald* [1976] 2 NZLR 99. It was repealed in 2003.

<sup>894</sup> “PP 27”, February 1997.

<sup>895</sup> “Evidence – Reform of the Law”, August 1999 (note 870).

The final Report in 1999 included, as Volume 2, a “Draft Code with Commentary”. This was largely reproduced in the eventual legislation, and in order to avoid duplication, references are to the final statutory provisions, with any deviations from the Commission’s original proposals referred to where appropriate.

### 1997 Discussion Paper

This had its origins in a double referral by the Minister of Justice to the Commission in August 1989. The first of these was:

To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.<sup>896</sup>

Preliminary Paper 27 invited responses to proposals for what was called a “Code Rule” for the admission of “propensity” evidence in criminal cases.<sup>897</sup> As part of the background to that invitation, the Commission summarised the contemporary state of the law, and highlighted the need for greater guidance for both judges and criminal counsel on the application of the ‘probity versus prejudice’ test.

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<sup>896</sup> The second was, in effect, to devise a “fair” system of criminal trial which was at the same time effective and efficient.

<sup>897</sup> “Propensity” was the word eventually selected by the Commission to encompass all the forms in which an accused’s previous behaviour (not necessarily criminal in nature) might be presented to a jury in a way which might prove unfairly prejudicial. In passing, the Commission doubted the utility of the distinction between “tendency” and “coincidence” evidence employed in the Uniform Laws in Australia; see PP27, para. 274. The Commission also rejected the need for the same ‘notice’ provisions as the Uniform Laws, given what it termed (at para. 274, f/n 162) a “high degree of disclosure of the prosecution’s case” in New Zealand.



The Commission acknowledged,<sup>898</sup> that “ . . . the feature of *DPP v P* which most advanced the law in relation to similar fact evidence” was the “refinement” of the probity versus prejudice equation which recognised that each application of the test is “a question of degree”.<sup>899</sup> It also took from that judgment the conclusion that “ . . . the issue in dispute at trial would affect what factors contributed to probative value”.

It then made the perceptive observations that:<sup>900</sup>

If the similar fact evidence is relevant merely to the general subject matter of the trial and not to the actual issue in dispute, such probative value as it may have can never outweigh the prejudicial effect. . . . This approach to admission of similar fact evidence requires a clear understanding of what is really in dispute between the parties . . . each case presents unique factors, and the imprecise nature of the “test” applied in considering admission means that it can be difficult for counsel to assess in advance whether the evidence will be admitted.

This led on to the further observation,<sup>901</sup> that “ . . . the Commission considers that guidelines to the admission of similar fact evidence can usefully be developed”. The guidelines which it went on to propose were based on two fundamental questions, the first of which was “Which behaviour should the rule govern?”

It went on to identify not just evidence which self-evidently would be likely to “generate unfair prejudice towards the defendant”,<sup>902</sup> but also,<sup>903</sup> “evidence – whatever

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<sup>898</sup> In para. 257.

<sup>899</sup> Per Lord Mackay LC in *DPP v P*, at 460-461 (note 290).

<sup>900</sup> In paras. 257-268. It also observed (at paras. 259-60) that the difficulties with the *Boardman* equation were still not all resolved, and that the possibility of collusion had been added to the list of problem issues following *DPP v H* (note 294).

<sup>901</sup> At para. 270.

<sup>902</sup> Para. 272.

<sup>903</sup> Para. 274.

its source – which might establish the defendant’s propensity to behave in the manner of the offence charged”.

This, it is respectfully submitted, came closer than any previous court or reform body to appreciating the full extent of Lord Herschell’s first statement of law in *Makin* – namely that the *mere fact* that an accused has behaved in *any* manner on *any* occasion is, of itself, *irrelevant*. *What makes such behaviour relevant is its factual link with, or connection to, a material issue in the instant case*. This fact found due recognition in the second question posed by the Commission.<sup>904</sup>

“Is the test which balances probative value against prejudicial effect an adequate basis on which to decide the admissibility of propensity evidence?”

Clearly, posed in such broad terms, it is not. The Commission answered its own question in paras. 275 and 276, in concluding that what was required was:

. . . . a clear understanding of those factors which contribute to probative value and of what constitutes prejudicial effect, as well as the recognition that those factors are not constant but influenced by circumstances . . . In deciding whether to admit similar fact evidence, the court would be required to take into account *the nature of the issue in dispute*. (original emphasis).

The Commission concluded this section of its Report, in para. 277,<sup>905</sup> with a list of suggested “factors to assist a court in assessing the probative value of the particular evidence.” These were substantially reproduced in the 2006 Act, and will be considered

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<sup>904</sup> Para. 275.

<sup>905</sup> It also, in para. 278, sought feedback on whether or not “the issue of collusion” ought to be added to the list.

in that context below. However, once again it would seem that the Commission had identified the most promising way forward in resolving ‘probity versus prejudice’ issues. That is, *to clearly identify the issue to which the propensity evidence is said to be relevant, and to subject that evidence to a realistic scrutiny in the light of factors designed to expose fatuous and implausible justifications for its admission.*

Seen in this perspective, it is not a matter of ‘balancing probity against prejudice’. One first identifies and acknowledges the prejudice, and then asks whether, despite that, the probative value of the challenged evidence is such that to exclude it would be a miscarriage of justice and/or an affront to common sense. The factors used to assess that probative value are then designed to identify the *precise relevance* of the evidence to a matter in issue at trial.

#### Law Commission Report 55 and the *Evidence Act 2006* (N.Z.)

In the Preface to its 1999 Report,<sup>906</sup> the Commission claimed to have “been confirmed” in its view that “codification was the only way to achieve truly comprehensive reform” of evidence law. It therefore set about that task, and the provisions of the Draft Code which dealt with propensity evidence, and which largely found their way unscathed into the *Evidence Act 2006*, can have come as no surprise to those who had read the 1997 Discussion Paper.

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<sup>906</sup> Note 870, page xviii. The Commission also referred to “ . . . a wide response from community groups, academics, members of the profession and the judiciary” to its earlier proposals, which had “ . . . greatly influenced the final content of the Evidence Code”. Those responses were presumably favourable, since little changed between PP 27 and the eventual legislation.

What follows is a summary of those provisions of the Act which impact in some way on the admission of propensity evidence, together with reference to the proposals and Commentary of the Commission which led to them.

## **7 Fundamental principle that relevant evidence admissible**<sup>907</sup>

- (1) All relevant evidence is admissible in a proceeding<sup>908</sup> except evidence that is –
  - (a) inadmissible under this Act or any other Act; or
  - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding

The Commentary, at p 31, observed that “Whether an item of evidence is relevant depends on the purpose for which it is offered”. The “probity factors” to be considered in cases involving propensity evidence are itemised in s 43 of the Act; see below.

## **8 General exclusion**

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will –

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<sup>907</sup> On p. 31 of the Commission’s Commentary on the Draft Code (“the Commentary”), section 7 is said to have the “important consequence” that once evidence is admissible, it is “ . . . admissible for all the purposes for which it is relevant, unless a specific Code provision excludes its use for a particular purpose”.

<sup>908</sup> “Proceeding” is defined broadly enough in s 4 of the Act to encompass both civil and criminal cases.

- (a) have an unfairly prejudicial effect on the proceeding; or
  - (b) needlessly prolong the proceeding.
- (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

The Commentary,<sup>909</sup> asserts that “Probative value will depend on such matters as how strongly the evidence points to the inference it is said to support, and how important the evidence is to the ultimate issues in the trial”.

Another difficulty which had arisen under the common law in practice was eliminated by clarifying that it is only “unfair” prejudice which will lead to the exclusion of a relevant item of evidence.<sup>910</sup> The Commentary,<sup>911</sup> identified “unfairness” as an “undue tendency to influence a decision on an improper or illogical basis. Commonly an emotional one . . . .”, or the admission of evidence “likely to mislead the jury . . . .”.

The detailed rules controlling the admission of propensity evidence are found in sections 40 to 43 of the Act, which reproduce sections 42-45 of the Draft Code without any substantial amendment. Whereas, under the Draft Code, “propensity” had been defined in the “Definitions and Interpretations” section (s 4), in the Act it is found in s 40, which reads:

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<sup>909</sup> At p 33.

<sup>910</sup> In the words of the Commentary (at p. 33), “. . . any evidence from the prosecution is going to be prejudicial to the defendant”.

<sup>911</sup> *Ibid.*

#### 40 Propensity rule<sup>912</sup>

- (1) In this section and sections 41 to 43, **propensity evidence** –
  - (a) means evidence that tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
  - (b) does not include evidence of an act or omission that is –
    - (i) 1 of the elements of the offence for which the person is being tried; or
    - (ii) . . . . .
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about –
  - (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable;
  - (b) . . . . .
- (4) . . . . .

This definition of “propensity” seeks to exclude evidence which is directly relevant to a criminal charge in that, to adopt the language of the English legislation, it “has to do with the facts of the case”. By this means, the Act accommodates ‘continuing offences’ of the type which *R v Katavich* involved.<sup>913</sup> But the reference to “elements” leaves unclear whether or not ‘propensity’ aspects of the overall incident on trial will be allowed in. If, for example, an accused, in seeking to overcome the

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<sup>912</sup> The section is reproduced only insofar as it concerns the use of propensity evidence by the Crown against an accused person.

<sup>913</sup> Note 866.

resistance of an intended rape victim, informs her that he found it necessary to kill his last rape victim, is this “propensity” evidence, or is it evidence regarding the “element” of the subsequent rape charge that the victim’s consent was obtained by ‘force or fear’?<sup>914</sup>

Despite the attempted broad definition of “propensity” in s 40, certain types of prejudicial evidence which were traditionally given ‘labels’ at common law seem not to have been included within the definition, and have thereby escaped the need for the balancing act required under s 43 between probative value and prejudicial effect. They have, however, been made subject to the “unfairness” test imposed by s 8.

These categories encompass what at common law was traditionally referred to as “relationship” or “background” evidence.<sup>915</sup> Immediately prior to the passing of the Act, in cases such as *MacDonald*,<sup>916</sup> and *Patel*,<sup>917</sup> evidence which shed light on the previous “relationship” between an accused and their victim was regarded as being separate from ‘similar fact evidence’, and admissible in order to supply the jury with “the complete story”, or to prevent the complainant’s account of events being “incomplete”.<sup>918</sup> This did not change following the enactment of s 40, although the prejudicial nature of such evidence came to be openly acknowledged.

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<sup>914</sup> A similar issue was confronted by the Court of Appeal in *R v McCreath* [2002] NZCA 31, when M overcame the resistance of his intended rape victim by telling her that he had “raped lots of chicks before”. That evidence was ruled to be admissible on the issue of the accused’s state of mind regarding the victim’s consent.

<sup>915</sup> These terms are regarded by the author as inter-changeable insofar as they relate to previous activities between accused and victim.

<sup>916</sup> (8 April 2005) CA 166/04.

<sup>917</sup> (12 April 2006) CA 426/05.

<sup>918</sup> See, in particular, the observations of the Court of Appeal in *Macdonald*, at [14].

Thus, within months of s 40 becoming law, the Court of Appeal in *R v Tanuvasa and Anor*,<sup>919</sup> ruled that evidence of child neglect by two parents was “relevant as background evidence” to specific charges of assaulting the same child, because:<sup>920</sup>

It would have been artificial to consider the allegations [of specific acts of violence] in isolation from the circumstances which led to the intervention of social workers, the supervision regime imposed on the appellants, the events leading to the discovery of the rib injury and the delays in obtaining medical treatment, as well as the other instances of neglectful treatment.

The same approach was taken by the Court in *R v Toia*,<sup>921</sup> in the context of previous acts of domestic violence being used as background evidence of “the nature of the relationship up to [the date of the assault alleged on the indictment]”. The Court did, however, acknowledge the prejudicial effect which such evidence might have, by citing with approval the following observations of the Court in *MacDonald*:<sup>922</sup>

New Zealand judges do not usually use the similar fact label to refer to background or relationship evidence. But obviously there is not a bright line distinction between such evidence and orthodox similar fact evidence. . . . Whether relationship evidence should be referred to as similar fact evidence may, in the end, be a matter of semantics. We say this because, whatever the label, there can be no doubt that such evidence is subject to exclusion if its illegitimate prejudicial effect exceeds its probative value.

In the instant case, defence counsel was forced to argue, unsuccessfully, that the challenged evidence should have been excluded, not under s 43, but under the broader provisions of s 8, which requires that the prejudicial effect “outweigh” its probative

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<sup>919</sup> [2006] NZCA 370. N.B. the factual similarity of this case to that of *Mohamed v R*, at Note 926.

<sup>920</sup> At [55].

<sup>921</sup> [2008] NZCA 343, at [7].

<sup>922</sup> Note 916, at [16], per William Young J.



value, and not simply equal it. Whatever the rights and wrongs of the decision on its facts, such ‘background’ evidence was clearly not about to be passed through the filter process of s 43.

The same fate befell the appealed evidence in *R v Gooch*,<sup>923</sup> in which G, charged with indecently assaulting and raping the family babysitter, was confronted by evidence from others which depicted him, by his actions and words, as an alcohol-fuelled, racist, sexually obsessed and frustrated individual who, after unsuccessful attempts to seduce the wives of his friends, took the opportunity afforded by the presence of the 15 year old victim in his house when he came home under the influence of alcohol. His defence had been one of reasonable belief in consent, and he had fared badly in the credibility contest.

The Court of Appeal held that the relevance of the evidence was not as propensity evidence, but,<sup>924</sup> as demonstrating “a particularly heightened level of sexual frustration proximate to the offending”. In other words, as ‘context’ evidence which assisted the jury in choosing between the two versions of events. The Court added that:<sup>925</sup>

An essential issue is whether the appellant had a reasonably based belief in consent. Evidence which may assist the jury to determine his state of mind at that time is relevant, and falls to be assessed under the s 8 Evidence Act 2006 balancing test.

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<sup>923</sup> [2009] NZCA 163. *McDonald* was also influential in a similar decision in *Vernon v R* [2010] NZCA 383. See also *R v Tainui* [2008] NZCA 119, *R v R* [2008] NZCA 342, and *R v Broadhurst* [2008] NZCA 454.

<sup>924</sup> At [6].

<sup>925</sup> At [8].

There is clearly a risk of New Zealand law once more descending into a process of ‘hair-splitting’ which would categorise some prior bad behaviour evidence as “propensity”, while leaving other, equally prejudicial, evidence, free of constraint.

With great respect, regardless of the ‘purpose’ for which it is adduced, the *effect* of ‘background’, ‘relationship’ and ‘context’ evidence, whatever label is attached to it, is to show the accused in a bad light, and thereby indirectly to ‘bolster’ the likelihood that the complainant will be believed. Section 40 was clearly drafted so as to have regard to what the evidence *tends to show*, not the narrowly-defined technical *purpose for which it is offered*. To depart from the broad spirit of s 40 is to invite a return to categorisation.

That point seems to have been appreciated in the latest case, at the time of writing, to consider the issue. This was *Mohamed v R*,<sup>926</sup> in which the Court held that the definition of “propensity evidence” contained within s 40 *did* include evidence of previous acts by the accused against the victim; as a result, such evidence has to be assessed against the provisions of s 43 before it may be admitted.

Writing in 2008,<sup>927</sup> the Commission expressed the opinion, of the rule enacted under s 40(2) that “The starting point no longer is exclusion, unless admission is justified. It is admissibility, unless exclusion is justified”. For good measure, it added,<sup>928</sup> that “Admissibility has become the rule instead of the exception”.

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<sup>926</sup> [2011] NZSC 52, delivered on 19 May, 2011. A husband and wife were charged with the murder of their child, two counts of grievous bodily harm against the same child, and failing to supply the necessary medical assistance on the day the child died. The challenged evidence, which was deemed admissible under s 43 to show the “state of mind” of the accused regarding the welfare of their child, involved the fact that the same child had been left for three hours in a closed van in a shopping centre car-park.

<sup>927</sup> Note 883, para.3.53. This, it added, “. . . reverses the traditional policy of the common law . . . A polar reorientation is required”.

<sup>928</sup> At 3.75.

This implies that the factors identified in s 43, when applied to the facts of individual cases, will be likely to result in the admission of a greater number of items of propensity evidence than was the case under the old, more generalised, common law rule. The Commission acknowledged that fact,<sup>929</sup> subject to the proviso that this increased level of admission would not include evidence “ . . . of the most seriously prejudicial type. The boundary will develop over time. No greater precision is possible at this juncture”.

It reinforced this opinion,<sup>930</sup> by adding that:

The 2006 Act reverses traditional underlying policies. Evidence of previous convictions is admissible, subject to exclusion by other provisions . . . The operational question is not, as previously, what is allowed in? It has become, what is to be excluded?

The principal section of the Act which relates to the admission of propensity evidence by the Crown against an accused is s 43, which differs in one significant respect from the original proposal by the Commission, as is explained below. Section 43 reads as follows:

#### **43 Propensity evidence offered by prosecution about defendants**

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have

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<sup>929</sup> At 3.78.

<sup>930</sup> At 9.24 and 9.25.

an unfairly prejudicial effect on the defendant.

- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the judge may consider, among other matters, the following:
  - (a) the frequency with which the acts, omissions, events or circumstances<sup>931</sup> which are the subject of the evidence have occurred:
  - (b) the connection in time between the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which the defendant is being tried:
  - (c) the extent of the similarity between the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which the defendant is being tried:
  - (d) the number of persons making allegations against the defendant that are the same as, or similar to, the subject of the offence for which the defendant is being tried:
  - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
  - (f) the extent to which the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which the defendant is

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<sup>931</sup> The original Draft Code section submitted by the Commission, s 45(3), did not contain the words “events or circumstances”, although its definition of “propensity evidence” did. Section 43(3) of the Act is clearly drafted so as to conform with the expanded definition of “propensity evidence” contained in s 40(1)(a) of the Act, and is therefore more consistent in its drafting than the Commission’s proposal.

being tried are unusual:

- (4) When assessing the prejudicial effect of evidence on the defendant, the judge must consider, among other matters,
  - (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
  - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

The one significant omission from the Commission's Draft Code referred to above was the requirement,<sup>932</sup> that before propensity evidence might be admitted against a defendant, there should be "sufficient" evidence to allow the "fact-finder" to "reasonably" find that the defendant was the person involved. This would have met difficulties of the type encountered in *Perry*,<sup>933</sup> without requiring beyond proof reasonable doubt in cases in which 'coincidence' reasoning was being relied upon. Its exclusion from s 43 appears to leave unresolved the issues raised in cases such as *Holtz*,<sup>934</sup> *Sanders*,<sup>935</sup> and *Peyroux*,<sup>936</sup> regarding whether the jury must be 'satisfied' that the previous behaviour cited was that of the accused before they may add it to the factual 'mix' leading to conviction.

Otherwise, s 43 would appear to have been the most comprehensive attempt thus far to encapsulate the spirit of *Makin* and *Boardman* into a statutory provision, while at the same time having regard to some of the problems which had been encountered in attempting to implement the broad generalised common law rule which had resulted

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<sup>932</sup> This was contained in s 45(1)(a) of the Draft Code.

<sup>933</sup> Note 53.

<sup>934</sup> Note 880.

<sup>935</sup> Note 882.

<sup>936</sup> Note 882.

from those two landmark decisions.<sup>937</sup> *Significantly, the New Zealand legislators had also acknowledged that concepts such as ‘probity’ and ‘prejudice’ cannot be applied in any generalised way, but require to be evaluated with respect to the facts of the case, and the ‘issue’ in that case to which they relate.*

Section 43(2) makes it mandatory for the judge to have regard to “the nature of the issue in dispute” when assessing the probative value of the contested evidence. The remaining factors in what might be termed ‘the probative evaluation’ – those contained in s 43(3) – are not mandatory. An opportunity was thereby missed of making the entire probity investigation a requirement of law which could be easily appealed; as drafted, s 43(3) is only discretionary, and the exercise of judicial discretion is much harder to challenge on appeal.<sup>938</sup> However, it would be much easier to argue, for example, that a trial judge had erred in law by admitting evidence of a single incident twenty years in the past, by reference to s 43(3)(a) and (b).

Section 43(4) also introduced an element of reality into the process, by requiring the trial judge, when assessing the potential ‘prejudice’ of an item of evidence, to take into account both ‘moral prejudice’, per subsection (a), and the more direct ‘reasoning prejudice’ which is reflected in subsection (b).

The earliest judicial reaction to s 43 seems to have been a difference of opinion as to whether it was meant to be merely declaratory of the common law,<sup>939</sup> or involved a

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<sup>937</sup> The Commentary, at p 121, said, of the matters listed in what became s 43(3) of the Act, that they ‘. . . follow the case law on admissibility of similar fact evidence’.

<sup>938</sup> For recent examples of judicial consideration of the factors specified under s 43(3) when considering the admissibility of similar fact evidence, see *Norman v R* [2011] NZCA 254 (admission, during N’s trial for sexual and physical abuse of his de facto, of evidence of similar behaviour against the same complainant); *R v Boynton* [2012] NZHC 2434 (relevance of previous acts of domestic violence when assessing new allegations); and *Pickering v R* [2012] 3 NZLR 498 (relevance of evidence of prior injuries on the body of a child whom P was accused of murdering). Reference was made, in all three cases, to the decision in *Mohamed* (note 926).

<sup>939</sup> This would have left available, for citation in future appeals, all the prior case-law.

‘fresh start’ with a ‘clean slate’. Among those in favour of a fresh start was Wild J in the High Court judgment in *R v Goodman*,<sup>940</sup> who expressed the hope that:

. . . s 43 will be applied as simply and logically as it is framed, and will not become encrusted with case law . . . I express the fervent hope that there will not be any attempt to interpret s 43 in the light of the current case law on propensity evidence . . . I say that because the current case law is confusing.

His Honour’s hopes were ultimately fulfilled. Despite some high-level suggestions to the contrary,<sup>941</sup> the majority of the Permanent Court of the Court of Appeal in *R v Healy*,<sup>942</sup> firmly ruled that:

The provisions relating to propensity evidence offer the opportunity of a clean slate in this area that should be grasped.

Still ongoing is a major issue which besets all jurisdictions which seek to adduce a person’s past life in evidence, namely establishing the very facts which are said to provide the probative link between the old and the new. This was alluded to in a paper issued recently by the Commission,<sup>943</sup> with the preferred option being to allow the trial

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<sup>940</sup> (12 June 2007) HC WANG CRI 2006-034-440.

<sup>941</sup> See, for example, Stevens J in *R v R* (19 July 2007) HC AK CRI-2006-092-11084, at [92]; Asher J in *R v Healy* (note 942, at [23]) and *R v G* (6 August 2007) HC AK CRI-2006-004-11979; Heath J in *R v T* (20 August 2007) HC NAP CRI-2006-020-2796. The Commission, differently constituted in November 2007 (in Issues Paper 4 – “Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character”) to what it had been in 1999, also observed (in para.3.60) that “There can be no doubt that the Commission proposed nothing less than a restatement and codification of the common law . . . with the three additional protections”.

<sup>942</sup> [2007] NZCA 451, at [54]. The Court, in [69], also rejected the suggestion that *Phillips* (note 653) should be followed in New Zealand, preferring the position that evidence of other alleged non-consensual sexual activity should be admissible at any trial of the same accused for alleged non-consensual sexual activity.

<sup>943</sup> See note 941.

judge to compile a statement of “ . . . the relevant circumstances of prior offending on the basis of material on record . . . ”.<sup>944</sup>

### **A premature review**

New Zealand Law Commission Report No 103,<sup>945</sup> arose from a Reference to the Commission by the New Zealand Government in 2006 to “ . . . review the law concerning the extent to which a jury in a criminal trial is made aware of prior convictions of an accused person and allegations of similar offending ”.<sup>946</sup>

It seems to have been provoked by the public outcry which followed the acquittal, of sexual offences charges, of two former police officers whose prior offending had not been disclosed to the jury.<sup>947</sup> The fact that the Commission almost immediately despatched a retired New Zealand High Court Judge (Andrew McGechan QC) to England in order to conduct his own enquiries into its experience of the 2003 Act in operation suggests that, as in that country, ‘law and order’ and ‘get tough on criminals’ policies might have been on the agenda. In the event, Mr. McGechan advised against the adoption of similar legislation in New Zealand, on the ground that it would not “fit New Zealand conditions” .<sup>948</sup>

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<sup>944</sup> At 9.32.

<sup>945</sup> “Disclosure to Courts of Defendants’ Previous Convictions, Similar Offending and Bad Character”, (May 2008).

<sup>946</sup> In “Forward”, p. iv.

<sup>947</sup> These cases had, however, been dealt with under the common law which prevailed prior to 2006; see Law Commission Ministerial Briefing 1 April 2010, para.5.

<sup>948</sup> *Ibid.*



In May 2008, the Commission reported that:<sup>949</sup>

Given that there has been some movement in recent years towards a more liberal admissibility of propensity evidence . . . it seems likely that the approach taken under the Evidence Act will be in favour of the maintenance of this more liberal approach, and even its expansion in some classes of case. In the light of this, we are not persuaded that there is any apparent difficulty with the statutory test that requires a weighing of probative value and prejudicial effect. . . . Any statutory test that did not involve the exercise of judgment and discretion would result in undue rigidity and hence injustice.

Given that, as at the date of the release of this Report (May 2008), the 2006 Act had been in operation for barely a year, it was hardly surprising that the Commission proposed,<sup>950</sup> that it continue to monitor the “operation and impact of [its] provisions”, and report back by the end of February 2010.<sup>951</sup> At the time of writing, it has not done so.

However, on 1 April, 2010, it published a Ministerial Briefing,<sup>952</sup> in which it proclaimed,<sup>953</sup> that “The picture, is, we think, very largely a positive one”. This was despite the fact,<sup>954</sup> that the Court of Appeal had, subsequent to the coming into force of the 2006 Act, shown a tendency to deal with what was essentially propensity evidence, not under s 43, but employing the “looser tests in sections 7 and 8 of the Act as the route to admissibility. This is not at all desirable . . . . However, it is not producing

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<sup>949</sup> At 10.4.

<sup>950</sup> At 10.6.

<sup>951</sup> This was subsequently extended to March 2010; see note 947, Para. 7.

<sup>952</sup> Note 947.

<sup>953</sup> *Ibid*, para. 9.

<sup>954</sup> Reported at para. 11.

injustice”.<sup>955</sup> It also reported, <sup>956</sup> that “. . . when the provisions were applied, they seem to be working smoothly and properly”.

In the same spirit of self-satisfaction, it added:<sup>957</sup>

. . . although the operation of this legislation has not been perfect, we think it remains possible that any wrinkles will be ironed out over time. Our recommendation . . . would be to keep the matter under review and deal with any issues arising in 2012, when the remainder of the Act will be reviewed . . .

As at the date of writing (March 2013) that review had not been published.

### **Ongoing issue regarding trial judge directions to the jury**

One substantial issue appears to have escaped clarification in the New Zealand reform process, namely the precise nature of the direction(s) which the trial judge should give to the jury in a case in which “propensity” evidence has been admitted for the Crown.

There had always been an awareness of the danger of a jury concluding that because an accused has behaved in some discreditable way in the past, therefore they

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<sup>955</sup> It added, at para. 48, that in the process “The Court has described what is clearly propensity evidence as merely “part of the narrative”, or “directly relevant””. See the cases cited at notes 919 and 921, and Optican and Sankoff, “Recognising propensity evidence”, [2009] NZLJ 284.

<sup>956</sup> *Ibid*, at para. 44.

<sup>957</sup> At paras.15 &16.

are more likely to be guilty of the behaviour they are now accused of. This was reaffirmed, after the passing of the 2006 Act, in *R v Taea*.<sup>958</sup>

However, it was also acknowledged, even after the passing of the Act, that:<sup>959</sup>

New Zealand appellate courts have . . . been less prescriptive than their Australian and Canadian counterparts as to how trial judges should sum up to juries and, in particular, far less enthusiastic about requiring particular forms of direction to be given in respect of commonly recurring issues.

In its Report 103,<sup>960</sup> the Law Commission had, however, foreshadowed that there might have to be a new approach to judicial directions to juries following the coming into force of the Act. This was because,<sup>961</sup> propensity evidence is essentially circumstantial in nature, and one of the “strands in the rope” of the overall Crown case. In future, it added,<sup>962</sup> judicial directions to the jury would be required in order to “. . . . identify the issue or issues to which that propensity evidence is said to relate, and how it is said to be relevant.”

This is clearly a step in the right direction of ensuring that similar fact evidence is only left for the consideration of a jury when the evidence really *is* “similar”, and that no other, less relevant, use is made of it. It has been acted upon by the courts.

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<sup>958</sup> [2007] NZCA 472 at [47].

<sup>959</sup> In *Mohamed v R* (Note 926), at [80], per McGrath and William Young JJ. See also the Supreme Court in *Wi v R* [2010] NZLR 11, at [40] and [41].

<sup>960</sup> Note 883.

<sup>961</sup> At 3.90.

<sup>962</sup> At 3.93.

In the pre-Act case of *R v Sanders*,<sup>963</sup> as has already been noted, the Court of Appeal,<sup>964</sup> had adopted the holistic approach that mere similarity between the accounts given by each of the complainants would be sufficient to prove the case as a whole beyond reasonable doubt. In *Stewart v R*,<sup>965</sup> the Court,<sup>966</sup> took up the challenge thrown down by the Commission and prescribed a seven-stage process which a trial judge should employ when directing a jury on the use which they might make of propensity evidence admitted under the Act,<sup>967</sup> which was reduced to a three-stage process by McGrath and William Young JJ in the Supreme Court in *Mohamed v R*.<sup>968</sup> This process involves the trial judge giving the jury a propensity direction constructed as follows:

- (a) Identify the evidence, and explain why it has been led, and the legitimate ways in which it may be considered by the jury;<sup>969</sup>
- (b) Put the competing contentions of the parties;
- (c) Caution the jury against reasoning processes which carry the risk of unfair prejudice.

At the same time, their Honours observed,<sup>970</sup> that “ . . . the requirement for such directions is not based on anything which appears in the Evidence Act 2006. Rather it is one which appellate courts . . . have imposed on trial judges”.

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<sup>963</sup> Note 882.

<sup>964</sup> At [20].

<sup>965</sup> [2010] 1 NZLR 197, at [34].

<sup>966</sup> At [30].

<sup>967</sup> It was subsequently claimed by the Commission (note 941, at para. 82) that the Court in *Stewart* had adopted the Commission’s “more detailed approach to the directions that should be given” in Report 103 (note 883).

<sup>968</sup> Note 926, at [95]. Their Honours observed (at [94]) that the attempt in *Stewart* “to provide something of a universal template was overly ambitious”. This was because (at [84]), “ . . . given our broad and literal approach to the definition of propensity evidence, much more evidence is encompassed by it than was perhaps thought to be the case when *Stewart* was decided”. In particular, they added, some forms of propensity evidence which might now be admitted under s 40 might not involve “orthodox similar fact reasoning”. The remaining judges (at footnote [1]), merely commented that “We prefer to leave consideration of [the directions suggested in *Stewart*] to a future case in which it is required”.

<sup>969</sup> During this process, they added, “We see no need for the judge to define “propensity”.”

Finally, they adopted the warning sounded by Lord Phillips in the English Court of Appeal in *R v Campbell*,<sup>971</sup> that:

Failure to give a direction that is no more than assistance in applying common sense to the evidence should not automatically be treated as a ground of appeal . . . .

In 2008,<sup>972</sup> the Commission had observed that “The directions which should be given in relation to section 43 are still in an early stage of formulation”. That process would seem, however, to have begun.

## Conclusion

Rather than attempt to depart from the essential validity of the balancing act required between ‘probity’ and ‘prejudice’ in all cases in which it is sought to adduce unsavoury evidence from an accused’s past in circumstantial proof of their guilt on a new occasion, New Zealand policy makers have sought to face and overcome the challenges which it poses. They have sought to drill down through the broad concepts of “probative value” and “prejudicial effect” and specify the factors which might underpin each. They have also cast aside the use of labels, and acknowledged the prejudicial effect of *all* ‘bad character’ evidence.

New Zealand has begun to implement a statutory regime which identifies in advance those factors which are to be taken into account in the balancing process

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<sup>970</sup> At [82].

<sup>971</sup> [2007] EWCA Crim 1472, [2007] 1 WLR 2798.

<sup>972</sup> Note 883, at 3.93.

between probity and prejudice, and requires that the trial judge give the jury clear directions on the use to which they may put any similar fact evidence which may be admitted. This is arguably the most effective way of skirting the quicksands which lurk beneath the seemingly solid green grass of the ‘categories’ approach, while also avoiding the vagueness of the *Boardman* formula.

This much had already been grasped by the Canadian Supreme Court, which has taken the process to a more detailed stage at a common law level. Its solution to the similar fact dilemma is considered in the next chapter.

## Chapter 9:

### The Canadian Solution

#### Chapter synopsis

Canada has avoided the need for complex legislation such as that found in England, and under Australian federal law. Nor has it chosen extreme positions like that adopted by the Australian High Court in *Pfennig*. By facing up to their duty to give the courts beneath them practical guidance on how to apply the ‘probity versus prejudice’ formula, the Supreme Court of Canada has put the law regarding the admissibility of ‘similar fact evidence properly so called’ on a rational and workable footing.

Its proud flagship is the unanimous judgment of the Supreme Court of Canada in *Handy* in 2002. *Handy* was, however, the culmination of a series of earlier judgments by the same Court.

#### The prelude to *Handy*

Canadian courts were no different from their common law counterparts in recognising the authority, first of *Makin*, then of *Boardman*.<sup>973</sup> Following *Boardman*, there was an increasing tendency to formulate the admissibility test in terms of

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<sup>973</sup> Note 235. The demise of the ‘categories’ method of analysis in favour of the ‘probity versus prejudice’ test was formally acknowledged by the Supreme Court of Canada in *R v Sweitzer* (1982) 137 D.L.R. (3d) 702; [1982] 1 S.C.R. 949, in which the unanimous Court observed (at 706) that while the ‘categories’ approach had been “useful”, it also had “ . . . a tendency to overlook the true basis upon which evidence of similar facts is admissible”, namely that “. . . its admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission.” See also *Guay v R* (1978), 42 C.C.C. (2d) 536; [1979] 1 S.C.R. 18, *R v Robertson* (1987), 33 C.C.C. (3d) 481; [1987] 1 S.C.R. 918 and *R v Morin* (1988), 444 C.C.C. (3d) 193; [1988] 2 S.C.R. 345.

relevance. Thus, in *Cloutier v R*,<sup>974</sup> it was said that the reason for rejecting, as inadmissible, evidence of mere propensity was that such evidence has “no real probative value”, while in *Morris v R*,<sup>975</sup> it was said that such evidence might only be admissible if it possessed “exceptional probative value”.

As the case-law developed, this “exceptional probative value” was recognised as proceeding from the “specific” disposition of an accused, rather than their disposition in general. The more factually aligned the accused’s behaviour in the past was to the behaviour alleged in the new indictment, the more probative it was seen to be.

Thus, in *R v D.(L.E)*,<sup>976</sup> a majority Court held,<sup>977</sup> that similar fact evidence was inadmissible if it possessed no probative value other than revealing “the disposition to commit certain types of wrongful acts”. Then in the following year, in *R v C.(M.H.)*,<sup>978</sup> a unanimous Court ruled,<sup>979</sup> that “Evidence as to disposition, which shows only that the accused is the type of person likely to have committed the offence in question, is generally inadmissible.” However, the future direction of Canadian law was indicated by the additional assertion that:<sup>980</sup>

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<sup>974</sup> (1979), 48 C.C.C. (2d) 1, at 29, per Pratte J at 29.

<sup>975</sup> (1983), 7 C.C.C. (3d) 97.

<sup>976</sup> (1989) 50 C.C.C. (3d) 142. In this case, D was charged with a relatively innocuous sexual assault on his daughter, and the trial judge admitted “uncharged act” evidence from the same complainant regarding more serious sexual offences against her in the past, to rebut defence allegations that the victim might have a motive for lying. Such evidence was held to be insufficiently relevant to overcome its prejudicial effect. In *R v B.(C.R.)* (1990) 55 C.C.C. (3d) 1, however, a majority led by McLachlin J. held that Canadian law still regarded disposition in itself as sufficient to provide the necessary probity in appropriate cases.

<sup>977</sup> At 156-8. This opinion seems to have based on the belief that the authority of *Ball and Ball* (note 173) had been overtaken by *Boardman*, and that *mere propensity in itself* was insufficiently probative to override the prejudice which inevitably came with it.

<sup>978</sup> (1991) 63 C.C.C. (3d) 385; [1991] 1 S.C.R. 763; see also *R v Litchfield* (1993) 86 C.C.C. (3d) 97; [1993] 4 S.C.R. 333.

<sup>979</sup> At 392.

<sup>980</sup> *Ibid.*



There will be occasions . . . where the similar fact evidence will go to more than disposition, and will be considered to have real probative value.<sup>981</sup> That probative value arises from the fact that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence.

The key element of this judgment proved to be the reference to *an absence of coincidence*, which was to be picked up and amplified in *Handy*. But prior to that final breakthrough there was continued confusion, nowhere better illustrated than in the unanimous Court ruling in *R v B.(F.F.)*.<sup>982</sup> B had been convicted of various serious assaults (some of them sexual) on his young niece during a ten year period some forty years previously, when she had been one of a group of siblings to whom B had regularly acted as a babysitter. Evidence had been admitted from the victim's brothers regarding the regime of physical abuse and intimidation maintained by B against the entire family during the relevant period, following assertions by defence counsel that the niece's allegations had been so fantastic that they had to be inventions.

The unanimous Court held that the evidence, although strongly indicative of B's abusive disposition, was admissible to explain why the victim had waited so long in order to complain, to rebut B's allegations that physical injuries to the victim had been caused by her mother, and to rebut B's defence of "innocent association" as merely a babysitter. The difficulty with that ruling is that "innocent association" is generally regarded, in its modern context, as being nothing more than a denial that the offences occurred; in being allowed to prove 'guilty' association, the Crown is in reality being allowed to trawl the accused's propensity before the jury. In the context of this case, Crown Counsel was being authorised to say to the jury, in so many words, "This man says that he was only the babysitter. His victim says that he used his connection with the family to abuse her. In resolving this credibility contest, the Crown asks you to take

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<sup>981</sup> This was held not to have been the case in the matter on appeal.

<sup>982</sup> (1993) 79 C.C.C. (3d) 112; [1993] 1 S.C.R.. 697.

on board what the other children in the family say about this man's behaviour towards *all* the siblings".

After this decision, it was almost impossible to deny that evidence of an accused's actions in the past had relevance to what they were alleged to have done in the matter on trial *solely because they revealed their tendency to behave in a certain way under certain conditions which were closely replicated in the incident before the court.*<sup>983</sup>

This closeness of circumstance, and the impossibility of putting it all down to coincidence, won the day in *R v Arp*,<sup>984</sup> and in the judgments in that case may be found the analytical precursors to *Handy*. A had been convicted of the murders of two women, B in 1989 and U in 1993. There was strong DNA evidence linking A with the second murder, but in order to connect A with the murder of B it had been necessary to employ similar fact evidence from the murder of U, in order to bolster the otherwise thin circumstantial Crown case against him.

This similar fact evidence had been held by the trial judge to justify the two counts being tried on the same indictment, and it consisted of the facts that (a) both victims were vulnerable young women alone in the same city in the early hours of the morning without transport or money; (b) each had been picked up in a grey pick-up truck which was similar to one owned by A; (c) a sexual motive could be attributed to each murder; (d) the body of each victim had been left in an isolated area outside the city; (e) the clothing of each victim had been discarded nearby, and (e) a sharp-edged knife appeared to have featured in each attack.

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<sup>983</sup> As Charron J.A. put it, in *R v B.(L.)* (1997) 116 C.C.C. (3d) 481; 9 C.R. (5<sup>th</sup>) 38 (Ont. C.A.), at [18], "... its relevance usually depends on the proposition that persons tend to act consistently with their character".

<sup>984</sup> (1998) 129 C.C.C. (3d) 321; [1998] 3 S.C.R. 339.

The trial judge described these similarities as “significant and striking”, and in his charge to the jury he advised them that they could use the evidence of each killing to prove A’s guilt of the other, but only for the limited purpose of identification. They were specifically told not to conclude that A was a person who, through his proven character or disposition, was likely to have committed the offences. He also advised them that they were free to conclude, should they so choose, that the circumstances of the two killings were so strikingly similar that it was likely that they were committed by the same person. He also directed them that if they were satisfied that A had committed the murder of U, and that the B murder was “likely committed by the same person”, then they could use this fact to support the additional circumstantial evidence against A on that count.

The unanimous judgment of the Supreme Court was delivered by Cory J, who began by observing that:<sup>985</sup>

. . . where the evidence shows a distinct pattern to the acts in question, the possibility that the accused would repeatedly be implicated in strikingly similar offences purely as a matter of coincidence is greatly reduced. . . . the evidence necessarily derives its probative value from the degree of similarity between the acts under consideration. The probative value must, of course, significantly outweigh the prejudice to the accused for the evidence to be admissible.

It then concluded, so far as concerned the use of such evidence to prove identity, that:<sup>986</sup>

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<sup>985</sup> At [43] and [44].

<sup>986</sup> At [48].

. . . . the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted. . . . Once it is determined on a balance of probabilities that the same person committed the alleged similar acts, the similar fact evidence may be admitted to prove that the accused committed the offence or offences in question.

At the same time, it held,<sup>987</sup> that it was not necessary for the Crown to prove beyond reasonable doubt that one person committed both offences. This is because similar fact evidence is essentially circumstantial in nature, and is only one element in a mix of information available to a jury, which is required to decide guilt beyond reasonable doubt *on the evidence as a whole*. The correct position was stated,<sup>988</sup> to be that:

. . . . the jury should determine, on a balance of the probabilities, whether the similarities between the acts establishes that the two counts were committed by the same person. If that threshold is met, the jury can then consider all the evidence relating to the similar acts in determining whether, beyond a reasonable doubt, the accused is guilty.

Applying those principles to the case in hand, A's appeal was dismissed.

*Arp* was, in some ways, an unusual case, in that 'coincidence reasoning' was not employed in order to conclude that A must have murdered two women with whom he could be factually connected. Instead, A could fairly convincingly be shown (via the DNA evidence) to be connected with one murder, and then the 'factual similarity' line of reasoning was employed to connect him to the second murder.

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<sup>987</sup> At [68].

<sup>988</sup> At [70].

The ongoing influence of *Arp* lay in the Court's endorsement of the approach taken by the trial judge in itemising those factors which made the facts of the second murder so similar to the one in respect of which there was strong evidence of A's involvement. It now remained for all the elements of the prior case-law, including *Arp*, to be combined in one final, authoritative, statement which placed the prior misbehaviour of an accused into an appropriate conceptual framework based on *relevance*. This was the legacy of *Handy*.

### **The *Handy* judgment**

In what is recognised<sup>989</sup> as the leading authority on propensity evidence in Canada, *R v Handy*,<sup>990</sup> the unanimous Supreme Court of Canada synopsis'd the relevant law in two simple paragraphs:<sup>991</sup>

Proof of *general* disposition is a prohibited purpose. Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but "moral prejudice", and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person.

Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

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<sup>989</sup> See, for example, Paciocco and Stuesser, *Essentials of Canadian Law: The Law of Evidence* (4<sup>th</sup> ed, Toronto, 2005), p. 48. See also *R v Candale* 2003 CarswellOnt 8077 (Ont. S.C.J. June 16, 2003) and *R v Ye* (2011) ONSC 2278 at [77].

<sup>990</sup> 2002 SCC 56.

<sup>991</sup> [72] and [55] respectively.

Taken in isolation, that second statement of law could have been drawn directly from *Boardman*. In the final analysis it was, but in *Handy* the Court dealt more effectively with the issues arising from the deceptive simplicity of the ‘probity versus prejudice’ formula than the ultimate appeal courts of other jurisdictions had proved themselves capable of doing. It did so by explaining what it meant in *practice*.

The two statements cited above were derived from several of the Court’s earlier pronouncements,<sup>992</sup> but most notably that of the majority Court in *R v B.(C.R.)*.<sup>993</sup> In that case, it had been acknowledged, first of all, that the *Boardman* test granted a measure of discretion to the trial judge, which would not lightly be overturned on appeal. Secondly, and crucially, it had also held that even “disposition” or “propensity” evidence is (exceptionally) admissible when the degree of “distinctiveness or uniqueness” between the similar fact evidence and the new charges, and the “connection” between such evidence and issues raised at trial, justify its admission for reasons *other than the mere fact* of the accused’s propensity.

The enduring legacy of *Handy* is the set of guidelines which the Court established for future trial judges to follow when seeking to apply the test it had identified in its second statement of law. It began with the timely reminder,<sup>994</sup> that “Propensity evidence by any other name is still propensity evidence”, and that,<sup>995</sup> even though it might be possible to identify the precise purpose for which it was being admitted:

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<sup>992</sup> These included *Sweitzer v R*, *R v Robertson*, and *R v Morin* (all note 973).

<sup>993</sup> Note 976, at 55. This case had been described as the “governing authority” in the subsequent cases of *R v C.(M.H.)* (note 978) and, more recently, in *Arp* (note 984). It was regarded by the Court in *Handy* (at [54]) as “... stating the law in Canada”.

<sup>994</sup> At [59].

<sup>995</sup> At [61].

. . . it does not (and cannot) change the inherent nature of the propensity evidence, which must be recognised for what it is. By affirming its true character . . . the Court keeps front and centre its dangerous potential.

This “true character” was then defined, not by reference to “the precise purpose for which” it is being admitted (which is of course the old ‘categories’ approach), but in terms of its *relevance to the issue(s) before the court*. Thus:

The policy basis for the exception is that . . . the force of similar circumstances defies coincidence or other innocent explanation . . . Canadian law recognises that as the “similar facts” become more . . . situation specific . . . the probative value of propensity . . . becomes more cogent. . . Ultimately the policy premise of the general exclusionary rule (prejudice exceeds probative value) ceases to be true.<sup>996</sup>

Step One in the analysis to be employed by the trial judge was said to be *the identification of the issue in respect of which the similar fact evidence is said to be admissible*. The importance of this had been emphasised in the earlier cases,<sup>997</sup> and to this the Court now formally added the requirement,<sup>998</sup> that “. . . the trial judge [should] instruct the jury that they may use the evidence in relation to that issue *and not otherwise*” (emphasis added).

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<sup>996</sup> At [47] and [48].

<sup>997</sup> Notably in *R v B.(C.R.)*, (note 976), at 732; *Sweitzer*, (note 973), at 953; *D.(L.E.)* (note 976), at 121; *R v Litchfield* (note 978), at 358; *R v B.(F.F.)* (note 982), at 731; *R v Lepage* [1995] 1 S.C.R. 654, at [35]; and *R v Arp*, (note 984), at [48].

<sup>998</sup> *Handy*, at [70], adding, at [71], that “. . . the general disposition of the accused” does not qualify as such an issue, citing Lord Goddard in *R v Sims* (note 203), at 700, that “. . . evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more”.

The Court,<sup>999</sup> imposed on the Crown the duty in every case to identify the “live issue in the trial to which the evidence of disposition is said to relate”. An associated factor in the decision which the trial judge has to make was said,<sup>1000</sup> to be “ . . . the relative importance of the issue in the particular trial”.

Having identified the *issue*, the next stage of the analysis was said,<sup>1001</sup> to be an assessment of the “principle driver of probative value”, namely the “. . . connectedness (or *nexus*) that is established between the similar fact evidence and the offences alleged” (original emphasis). This had been identified in *Arp*,<sup>1002</sup> as the factor which established “the objective improbability of coincidence”, and in *R v Carpenter*<sup>1003</sup> it had been pointed out that:

The degree of similarity required will depend upon the issues in the particular case, the purpose for which the evidence is sought to be introduced and the other evidence.

By way of illustration, a comparison was drawn,<sup>1004</sup> between a case in which identity is in issue (when something amounting to a “signature” behaviour by the accused might be required), and one in which “animus” was the issue, in which case

<sup>999</sup> At [74]. The corollary of this was said to be that if the identified issue is no longer “live”, then the evidence should be excluded as being irrelevant. For example, in *R v Proctor* (1992), 69 C.C.C. (3d) 436 (Man. C.A.), the evidence of two young women that P had attacked them in a similar manner, on his trial for the murder of a third woman, was held to be irrelevant, and therefore inadmissible, on the issue of identity, since P was not denying the act, but was pleading insanity. See also *R v Clermont* [1986] 2 S.C.R. 131; *R v Hanna* (1990) 57 C.C.C. (3d) 392; *R v Bosley* (1992) 18 C.R. (4<sup>th</sup>) 347 (Ont. C.A.), and *R v B.(L.)* (note 983).

<sup>1000</sup> *Ibid* The Court was also at pains, at [75], to warn that these “issues” were not to be classified as “categories of admissibility”, thereby avoiding any risk of the re-emergence of the ‘categories’ regime which had followed *Makin*.

<sup>1001</sup> At [76]. The case at hand was not one which required the use of similar fact evidence to prove identity; rather, the contested evidence was being used, in a sexual offence case, to establish the sexual proclivities of the accused. At [78] it was asserted that when comparing an ‘identification’ use of similar fact evidence with its use in an ‘actus reus’ context, “. . . the issue is *different*, and the drivers of cogency in relation to the desired inferences will therefore not be the same” (original emphasis).

<sup>1002</sup> Note 984, at [48].

<sup>1003</sup> (1982) 142 D.L.R. (3d) 237 (Ont.C.A.), at 244.

<sup>1004</sup> At [79] and [80].



“ . . . a prior incident of the accused stabbing the victim may be admissible even though the victim was ultimately shot – the accused says accidentally”.

It was also said to be important to identify the “connecting factors” between the similar fact evidence and the facts alleged on the indictment, and,<sup>1005</sup> “to pay close attention to similarities in character, proximity in time and frequency of occurrence”. The judgment went on,<sup>1006</sup> to list, as some of “the factors connecting the similar facts to the circumstances set out in the charge”, (a) proximity in time; (b) similarity in detail; (c) number of occurrences of the similar acts; (d) circumstances relating to the similar acts; (e) any “distinctive feature(s)” unifying the incidents; (f) any intervening events; and (g) “any other factor which would tend to support or rebut the underlying unity of the similar acts”.

On the ‘prejudice’ side of the equation, the Court,<sup>1007</sup> identified the “inflammatory nature” of the similar acts, and whether it is possible for the Crown to prove the same issue by means of less prejudicial evidence. It concluded,<sup>1008</sup> with the observation that “This list is intended to be helpful rather than exhaustive. Not all factors will exist (or be necessary) in every case”.

By reference to this factor analysis process, the Court,<sup>1009</sup> was able to conclude that:

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<sup>1005</sup> At [81], citing *Wigmore on Evidence*, Chabourn rev.1979), vol.II, pp. 245-6 that “Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the similarity of the instance . . . .”. The “similarity of the instance” had been regarded as a significant factor in *Arp* (note 984), *Cloutier* (note 972) and *R v B.(C.R.)* (note 976).

<sup>1006</sup> At [82]. Most of the factors cited had emerged in earlier case-law.

<sup>1007</sup> At [83].

<sup>1008</sup> At [84].

<sup>1009</sup> At [91].

References to “calling cards” or “signatures” or “hallmarks” or “fingerprints” . . . describe propensity at the admissible end of the spectrum.<sup>1010</sup> . . . The issue at that stage is no longer “pure” propensity or “general disposition” but repeated conduct in a particular and highly specific type of situation.

Having cited *Pfennig*,<sup>1011</sup> as an example of a case in which the similar fact evidence was very much “at the admissible end of the spectrum”, the Court declined to follow the final *Pfennig* test because,<sup>1012</sup> it represented “ . . . too great an intrusion by the trial judge in the fact finding mandate of the jury”.

The precise role of the trial judge was also considered in the context of allegations by the defence that so-called similar fact evidence is in fact the result of collusion. This had been raised as an appeal point in the instant case, in which H had been charged with what amounted to non-consensual ‘rough sex’ (including anal intercourse) with A during a casual liaison in a motel room. H’s defence was that A had consented to everything which had occurred, and the principal issue therefore became one of credibility. The Crown had been allowed to adduce the similar fact testimony of H’s ex-wife (B), who recounted seven specific occasions during their relationship upon which H had behaved in such a way towards her. From this, the jury would have formed an impression of H as a man with a propensity to inflict painful sexual experiences on his sex partner, and who, when sexually aroused, refused to take “no” for an answer.

This evidence had been allowed before the jury despite the fact that B admitted that prior to the alleged incident between H and A, she had advised A of her allegations

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<sup>1010</sup> It had described such minutely detailed similarity, in the preceding paragraph, as “ . . . the observed pattern of propensity operating in a closely defined and circumscribed context”.

<sup>1011</sup> Note 564.

<sup>1012</sup> At [93]. It added, at [97], that “ . . . the “conclusiveness” test takes the trial judge’s “gatekeeper” function too far into the domain of the trier of fact”.

against H, and the fact that she had obtained criminal injuries compensation in respect of these simply by making a formal complaint. The trial judge had refused to exclude the evidence of B,<sup>1013</sup> on the ground of collusion, and had instead left that as a factor to be taken into account by the jury.

On appeal, the Court took a different approach to the issue of collusion, regarding it not simply as a credibility factor for the ultimate decision of the jury, but as something which struck at the very heart of the admissibility of the evidence. In its words:<sup>1014</sup>

... it was part of the trial judge's "gatekeeper" function to consider this issue because collusion, if established to the satisfaction of the trial judge on a balance of probabilities,<sup>1015</sup> would be destructive of the very basis on which the similar fact evidence was sought to be admitted, namely the improbability that two women would independently concoct stories with so many (as the Crown contends) similar features.

It added that the deferral of the issue of collusion to the jury had been an error of law by the trial judge which in itself was sufficient to require a new trial. However, and presumably because of the importance of the guidance which was being offered to subsequent courts, the Court continued with an analysis of the case in light of the factors which it had already outlined.<sup>1016</sup>

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<sup>1013</sup> Logically, the evidence which was thereby compromised was that of A, not B. The principle which therefore emerges from this case is that the probative value of similar fact evidence which takes the form of allegedly non-coincidental allegations can be weakened by an attack on the 'coincidence' element of *any one of them*.

<sup>1014</sup> At [99]. The Court in the earlier cases of *B.(C.R.)* (note 976), at 733-4, and *Arp* (note 984), at [47] and [48], had already acknowledged that in their "gatekeeper" role, trial judges usurp some of the traditional 'weight assessment' functions of the jury.

<sup>1015</sup> In [112] it confirmed that the burden lay with *the Crown* to satisfy the trial judge on a balance of probabilities that there had been no such collusion in a case such as this, in which there was "an "air of reality" to the allegations".

<sup>1016</sup> In [101] – [152]. It preceded that with an acknowledgment (at [100]) that the prejudicial effect of B's evidence had been "inflammatory"

Beginning with an acknowledgment that all similar fact evidence is presumptively inadmissible, the question became one of whether or not the contested evidence was “strong enough to be capable of *properly* raising in the eyes of the jury the double inferences contended for by the Crown” (original emphasis). The first step in that process being the identification of “the issue in question”, the Court cautioned against allowing “too broad a gateway for the admission of propensity evidence or, as it is sometimes put, to allow it to bear too much of the burden of the Crown’s case”. In this regard, there was a risk that by identifying “the issue” as simply that of the credibility of the complainant, the jury would be allowed to hear evidence “of nothing more than general disposition (“bad personhood”)", since “Anything that blackens the character of an accused may, as a by-product, enhance the credibility of a complainant”.

The Court also challenged the true relevance of the ex-wife’s alleged lack of consent to the various sexual indignities inflicted upon her by H, observing that “Because complainant A refused consent in 1992 scarcely establishes that complainant B refused consent in 1996”<sup>1017</sup>. In essence, the issue arising from H’s alleged “sexual intransigence” was not the broad one of the credibility of the complainant, but, “more accurately and precisely framed”, “. . . the consent component of the *actus reus* and in relation to that issue the respondent’s alleged propensity to refuse to take no for an answer”.

With regard to the “proximity in time” between the acts alleged on the indictment and those alleged in the similar fact evidence, the Court concluded that the ex-wife’s evidence gained “. . . cogency both from its repetition over many years and its most recent manifestation a couple of months before the offence charged”. However, the Court also noted several dissimilarities which the trial judge appeared to

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<sup>1017</sup> A similar caveat had been imposed by the Australian High Court in *Phillips*; see note 653.

have overlooked,<sup>1018</sup> the most important of which being that each of the incidents recounted by the ex-wife occurred in the context of a dysfunctional long-term relationship, and not a casual liaison in a motel room.

Continuing to apply the factors it had identified, the Court ruled that there were no “distinctive features unifying the incidents”, and no “intervening events to undermine their probative value”. So far as concerned “the strength of the evidence that the similar acts actually occurred”, the Court was satisfied that “the issues were fully argued”<sup>1019</sup> on the *voir-dire*, although it sounded the warning that a trial judge must be satisfied that the similar fact evidence was *capable* of belief before allowing the jury to consider whether or not to believe it.

Noting,<sup>1020</sup> the “inflammatory nature” of the ex-wife’s evidence, and the fact that “The jury would likely be more appalled by the pattern of domestic sexual abuse than by the alleged misconduct of an inebriated lout in a motel room on an isolated occasion”, the Court observed that “ . . . this evidence has a serious potential for moral prejudice” and,<sup>1021</sup> “ . . . significant reasoning prejudice”, which might have been to some extent ameliorated by “limiting [its] nature and extent” more than had been done.<sup>1022</sup>

On the nature of the final balancing act involved, the Court observed that:<sup>1023</sup>

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<sup>1018</sup> These also included the fact that one of the alleged incidents was a non-sexual “choking” assault, and that none of them began as consensual activity.

<sup>1019</sup> These “issues” concerned certain inconsistencies in the evidence of the ex-wife.

<sup>1020</sup> At [140].

<sup>1021</sup> At [147].

<sup>1022</sup> By agreement, the jury had not been told that H had served a prison term for two sexual assaults on other parties.

<sup>1023</sup> At [149] and [150].

As probative value advances, prejudice does not necessarily recede. . . . the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved.

Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process.

In conclusion it ruled that:<sup>1024</sup>

It can hardly be doubted that the jury, listening to the ex-wife's evidence, would form a very low opinion of the respondent as an individual who behaved abominably towards his wife, and be readier on that account to believe the worst of him in his conduct towards the complainant. This is precisely the sort of general disposition reasoning (moral prejudice) that the similar fact exclusion rule was designed to prevent.

. . . quite apart from the other frailties of the similar fact evidence previously discussed, the trial judge's refusal to resolve the issue of collusion as a condition precedent to admissibility was an error of law. A new trial is required.

Apart from the step-by-step guidance which *Handy* offered to future trial judges faced with ruling on the admissibility of similar fact evidence, it served to identify, more than any other ultimate court of appeal in any other jurisdiction, the central importance of *critically evaluating the essential relevance of such evidence in the light of the purpose for which it is being offered, and ensuring that the jury are not allowed to employ it for any other purpose*. As such, it constituted a triumph of strict logic over confused and distracted reasoning.

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<sup>1024</sup> At [152] and [153].

### An early test of the *Handy* ruling

The Court did not have to wait long for another opportunity to demonstrate how the tests they had prescribed in *Handy* might be applied. *Shearing v R*,<sup>1025</sup> had been argued on the same day, before the same judges, as *Handy*, although the judgement in *Shearing* was handed down a month later than *Handy*. *Shearing* was a paradigm case of potentially massive moral prejudice arising from similar fact evidence of disputed relevance. Although divided 7-2 on another issue raised on appeal, the Court was unanimous in applying the *Handy* tests and dismissing the appeal on the similar fact point.

S was a religious cult leader who was tried on 20 counts of sexual abuse of young females during the period from 1965 to 1989. There were a total of 11 complainants, 9 of whom (referred to on the appeal as the “Non-G” complainants) had been adherents of the cult led by S, and who were alleging that he had abused his position of spiritual authority over them to overcome any objection they might have had to sexual familiarities, which S had persuaded them was a legitimate path to spiritual awakening, and a means of combating negative spiritual forces which were attacking them. The remaining 2 victims were sisters (whose surname began with G, and who were therefore referred to as the “G complainants”) who had resided in the cult’s group residence, where their mother, herself a devotee of the cult, was employed as housekeeper. Their allegations against S involved sexual abuse accompanied by “quack spiritualism” which had been facilitated by their virtual imprisonment in the cult residence and a regime of physical abuse by their mother, at S’s instigation. All the counts were tried on the same indictment, and the evidence of each of the 11 complainants was admitted as similar fact evidence supporting the allegations of the others.

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<sup>1025</sup> 2002 SCC 58.

The majority Court,<sup>1026</sup> had no difficulty identifying:

. . . the exceptional prejudice of the similar fact evidence. It is bad enough for a spiritual leader to be accused of taking sexual liberties with his disciples. It is a good deal worse to have the added element of child abuse. Similarly in the case of the G complainants, child abuse is made worse, if possible, when overlaid with spiritual cant.

Following,<sup>1027</sup> “. . . .the steps described in *Handy*”, the majority confirmed that although there had been a suggestion of collusion,<sup>1028</sup> there had been “. . . nothing sufficiently persuasive to trigger the trial judge’s gatekeeper function”, and he had been correct in allowing the issue of collusion to go to the jury with a warning to be mindful of that possibility. They then went on to identify the “issues” to which the similar fact evidence might be said to be admissible, which varied as between the two groups of complainants.

S’s defence to the allegations by the two G complainants was a flat denial that the incidents alleged had actually occurred, and the Crown argued that the probative value of the similar fact evidence from all 11 complainants lay in the inherent unlikelihood, absent collusion, that so many complainants might coincidentally concoct stories with such specific allegations of the same exploitive techniques employed by S. In the case of the “non-G complainants” (i.e. the cult followers), S claimed that they had consented to his actions, and the issue for the Crown was therefore whether or not that consent had been obtained by spiritual exploitation, which the majority held,<sup>1029</sup> “. . . might be thought by the jury to demonstrate sufficient situation-specific propensities for

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<sup>1026</sup> At [36].

<sup>1027</sup> At [37].

<sup>1028</sup> This was confirmed, at [40] as being “an alternative explanation for the “coincidence” of evidence emanating from different witnesses”, which “destroys its probative value, and therefore the basis for its admissibility”.

<sup>1029</sup> At [47].



non-spiritual sex to negative the appellant's claimed innocent "spiritual" purpose". In rebuttal of *both* lines of defence, the Crown had been entitled to rely upon what the majority ultimately concluded was the situation-specific *modus operandi* revealed by the similar fact evidence, if believed.

The majority was able to conclude that:<sup>1030</sup>

While the sexual acts themselves were not particularly distinctive, the underlying unity lies in the alleged abuse of a cult leader's authority. It is the fantastic sales pitch and rationale developed by the appellant that could be considered "particular and distinctive".

Additionally, the allegations made by both sets of complainants "overlapped and were to some extent concurrent. Proximity in time makes the evidence more cogent as it reduces the likelihood that the appellant had changed his ways".<sup>1031</sup> Likewise, the fact that the incidents were spread over a 25 year time period demonstrated "a degree of extended consistency in behaviour".

Nor did S's appeal fare any better when the Court came to consider the "circumstances surrounding" the similar fact allegations, which the majority described,<sup>1032</sup> as being ". . . united by the allegation of gross abuse of power by a cult leader". So far as concerned the "distinctiveness" test, they added that:<sup>1033</sup>

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<sup>1030</sup> At [50]. At [52], they added that "Similarity does not lie in the physical acts themselves . . . . The similarities really lay in the *modus operandi* employed by the appellant to create sexual opportunities". This was also said [at 53] to be supported by the sheer number of alleged incidents of "situation specific behaviour".

<sup>1031</sup> At [51].

<sup>1032</sup> At [54].

<sup>1033</sup> At [55]. At [57] and [58] they also added in the factors of the age of the majority of the complainants and S's insistence on confidentiality to reach the final conclusion that "A jury might well reasonably

The combination of spiritualist imagery (achieving higher states of awareness) and horror stories (invasion of young girls by disembodied minds), and the supposed prophylactic power of the appellant's sexual touching to ward off these horrific threats is, to say the least, distinctive.

In concluding that the alleged dissimilarities in the complainants' accounts of events "did not detract significantly from the probative value of the evidence on the issue of the *modus operandi*", the majority,<sup>1034</sup> took the opportunity to warn against:

. . . an excessively mechanical approach. The judge's task is not to add up similarities and dissimilarities and then, like an accountant, derive a net balance. At microscopic levels of detail, dissimilarities can always be exaggerated and multiplied. This may result in distortion . . . At an excessively macroscopic level of generality, on the other hand, the drawing of similarities may be too facile.

The trial judge was not required to sum up the two sides of an artificially constructed ledger as contended for by the appellant.

Before concluding that the appeal on the similar fact issue should be dismissed, the majority,<sup>1035</sup> repeated what had been said, not only in *Handy* but in several of the cases which had led to it,<sup>1036</sup> namely that:

. . . a good deal of deference is inevitably paid to the view of the trial judge . . . the Court recognises the trial judge's advantage of being able to assess on the spot the dynamics of the trial and the likely impact of the evidence on the jurors. . . . absent error in principle the decision should rest where it was allocated, to the trial judge.

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conclude that the appellant's behaviour in these different settings was sufficiently situation specific to warrant the drawing of the double inferences"

<sup>1034</sup> At [60] and [61].

<sup>1035</sup> At [73].

<sup>1036</sup> For example, *R v B.(C.R.)*(note 976).

## Eleven years on

*Handy* has stood the test of time, as “. . . a clear direction to identify clearly and precisely the probative value of evidence of the accused’s prior bad acts and to weigh carefully its prejudicial effects before determining its admissibility”.<sup>1037</sup> It has been followed over one hundred and fifty times in the decisions of the intermediate appeal courts of Canada, and has not been seriously questioned by any subsequent Supreme Court of Canada bench. It has also proved to be extremely flexible in application, and capable of allowing a trial judge to admit evidence which, while undoubtedly prejudicial in its revelations of an accused’s true character, is nevertheless essential if the jury is to be given “the full picture” prior to making its decision on *all* the relevant facts. One example will suffice.

In *R v Groulx*,<sup>1038</sup> G was about to stand trial for the second-degree murder of his mother, Y, with whom he was residing at the time of her death. Cause of death was either manual strangulation or “shaking syndrome” (either would have been sufficient to cause death), and in addition Y’s body bore signs of multiple, but non-fatal, blunt force impacts. The Crown’s case was that G had killed her in a drunken rage, as the final act in a long and dysfunctional relationship between them. In support of this theory, it sought, in a pre-trial application, to obtain leave to adduce evidence of prior violence by G against Y, his acts of violence against his former de facto C, who had lived with the parties at a material time in the past when G had been violent towards Y, G’s abuse of alcohol and drugs, G’s acts of violence towards male friends when drunk, and G’s loss of his drivers’ licence through drink-driving, which had led to one of the prior incidents of violence against Y, when she had been acting as his driver. The way in which these issues were dealt with on the application is a strong vindication of the utility of the tests which had been handed down in *Handy*.

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<sup>1037</sup> Stewart, “Rationalizing Similar Facts: A Comment on *R v Handy*”, (2003) 8 Can. Crim. L. Rev 113.

<sup>1038</sup> 2011 ONSC 1316. See also *R v Villeda* (2011) 265 C.C.C. (3d) 433, an Alberta Court of Appeal case.

After reviewing the principles expounded in *Handy*, and noting that this was not a case in which the propensity evidence was being admitted in order to prove either identity or the *actus reus* of the crime, Pelletier, J. reminded himself,<sup>1039</sup> that it was important to establish the precise issue(s) in the case to which the challenged evidence was said to be relevant, because:

As the analysis moves away from “similar fact evidence” in the traditional sense towards “evidence of other discreditable conduct”, the issue of the admissibility of the evidence is resolved by placing greater emphasis on the specific relevance of the evidence to an area of dispute in the trial than it is by drawing comparisons between the proposed evidence and the circumstances of the offence being tried.

Using this as his guiding principle, the judge ruled,<sup>1040</sup> that, since “. . . deliberately causing the death of one’s parent is a peculiar and unusual allegation . . . In isolation, the events of [the evening of Y’s death] concerning the accused and his mother are difficult to understand and interpret”, *some* of the evidence of G’s prior relationship with Y,<sup>1041</sup> was admissible because “Without the necessary background information, the events giving rise to the charge of second degree murder are, in my view, only a portion of the account that must be considered to place those events in their proper context”.

At the same time, his Honour recognised,<sup>1042</sup> the potential for such evidence to create “. . . both moral prejudice, that the accused is a bad man who should be punished regardless of the events giving rise to the . . . charge, and reasoning

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<sup>1039</sup> At [17].

<sup>1040</sup> At [21].

<sup>1041</sup> This evidence revealed that the deceased was a difficult, withdrawn and slovenly individual who had given up on life after the death of her husband, and who was careless in matters of housekeeping, personal hygiene and eating habits, imposing considerable stress on those who had to cohabit with her.

<sup>1042</sup> At [22].

prejudice, [such that] that the trial process becomes a series of tangential inquiries into events removed in time and location from the central enquiry of the events resulting in [Y's] death". Nevertheless<sup>1043</sup>, this prejudice was in a sense ameliorated by the fact that the previous acts were "considerably less serious in nature" than the murder charge, that the adduced evidence could be "organised" so as " . . . to avoid overwhelming the jury . . . .", and that by limiting the evidence to "a series of specific episodes", the accused would be afforded the opportunity to rebut it, or explain it away. Finally, the potential prejudice could be minimised by means of "a clear and limiting instruction on the use of such evidence . . . before the evidence is adduced and again in the final instruction".<sup>1044</sup>

Employing what might be termed this 'tailored' approach to all the available propensity evidence, the Crown was granted leave to adduce evidence of:

(a) An incident in which G lost his temper with the deceased because she had left unwashed dishes in the kitchen, and threw them around the kitchen, breaking them in the process. In addition, a similar incident in which G's response to unwashed dishes was to threaten to kill Y, choking her and throwing her across the room. Although such evidence was said,<sup>1045</sup> to be "undoubtedly harmful to the issue of the accused's character", it was nevertheless held to be admissible because it was " . . . quite compelling in terms [of] the relationship that existed between the parties and the accused's perception of his mother . . . [it] is directly related to the conflict between the parties and the duration of the accused's frustration and anger towards his mother".

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<sup>1043</sup> At [24].

<sup>1044</sup> These "instructions" are presumably ones which are to be issued to the trial jury.

<sup>1045</sup> At [25].

(b) Threatening gestures by G against his mother involving the use of a large knife. This was also held,<sup>1046</sup> to be admissible because it “ . . . is further probative of the extent of the animosity between [G and Y] and therefore admissible notwithstanding the negative impact upon the perception of [G’s] character . . . ”.

(c) G making threatening gestures towards Y with a baseball bat, throwing items from the recycling bin at Y, and on several occasions pouring water over her, which were admissible because,<sup>1047</sup> they were “ . . . similarly relevant to [G’s] attitude towards [Y]”.

(d) An incident in which G threatened to burn down the home, producing gas containers from the garage, and then both chasing and threatening Y with both a grass trimmer and a chainsaw. This was provoked by Y’s refusal to bathe herself, and was held,<sup>1048</sup> to be admissible because it “ . . . reveals [G’s] animosity towards [Y] and his degree of frustration over her self-neglect . . . . Evidence that [G] consumed alcohol and was intoxicated during all episodes previously mentioned necessarily forms part of the description of those events”.

(e) G’s admission to a friend that he had given Y “a couple of black eyes”, which was held,<sup>1049</sup> to be admissible because it “ . . . relates directly to violence by [G] directed at [Y] and is probative of his animosity towards [Y]. Its relevance is related to the issues of *animus*, motive and intent”.

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<sup>1046</sup> *Ibid.*

<sup>1047</sup> *Ibid.*

<sup>1048</sup> *Ibid.*

<sup>1049</sup> *Ibid.*

But the true value of *Handy* emerges from the approach which the judge took to other items of bad character evidence which the Crown sought to adduce under the thin pretext that it supplied a more comprehensive “background” to the events surrounding Y’s death. They were firmly excluded because they were either insufficiently relevant to a live issue in the trial, or because, although of marginal relevance, they were outweighed by their potential prejudiciality. They were as follows:

(a) Evidence of G’s violence and threats to, and sexual abuse of, his de facto C, during incidents which also involved threats and violence to Y. The Crown argued that this was relevant in explaining why C did not do more to protect Y from G, and in demonstrating G’s “. . . attitude towards women who displeased him, and how he responded to those situations”. After observing,<sup>1050</sup> that “. . . this evidence has to be approached with caution”, the judge held it to be “. . . too vague and subjective”. Most tellingly, he concluded,<sup>1051</sup> that “The relationship between [G] and [Y] and the relationship between [G] and [C] was markedly different in terms of its nature, duration, dependency and intimacy, rendering evidence of violence towards [C] purely a question of propensity for violence with little, if any, added value”.<sup>1052</sup> Later in his judgment,<sup>1053</sup> his Honour ruled that this aspect of his ruling might have to be reconsidered “. . . if [C] is significantly challenged in cross-examination on the basis of her actions, inactions or decisions relating to her relationship with [G]”.

(b) Evidence of alleged acts of violence by G against his friend N were similarly disposed of, despite Crown assertions that it “. . . tends to show how [G] responded to conflict and how he treated those who contradicted or in some other way displeased him”.<sup>1054</sup> His Honour concluded,<sup>1055</sup> that “This line of reasoning has to do with

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<sup>1050</sup> At [32].

<sup>1051</sup> *Ibid.*

<sup>1052</sup> His Honour also added, at [34] that “The potential for both moral and reasoning prejudice concerning misdeeds by [G] against [C] is considerable”.

<sup>1053</sup> At [52].

<sup>1054</sup> At [39].

propensity generally and has little if any further connection to the issues of *animus* towards [Y], motive, intent, state of mind or the relationship between [G] and [Y] specifically”.

(c) Evidence of G’s drinking habits, and his consumption of marihuana, on occasions *other than* those involving those incidents in respect of which propensity evidence had already been held to be admissible, was also disposed of strictly within the confines of issues which were likely to be live during the trial. Given that the defence had already indicated that intoxication was not to be raised by G as a defence, the evidence of his alcohol consumption was held to be inadmissible to rebut that. As regards the Crown assertion that the evidence was necessary in order to “level the playing field” regarding allegations which might be made regarding the lifestyle of some of the Crown witnesses, his Honour ruled,<sup>1056</sup> that should the defence take that line, then evidence of G’s drinking habits might become admissible “ . . . in order to avoid what may be an inaccurate depiction of [G] as a pillar of morality among questionable characters”. But unless and until that happened, evidence of G’s substance abuse was “ . . . of little assistance either in relation to narrative, context or intent”.<sup>1057</sup>

(d) Evidence of the fact that G was banned from driving due to a previous drink-driving conviction was said by the Crown to be relevant to an incident in which Y had been acting as G’s driver, and he had assaulted her during an argument. His Honour observed,<sup>1058</sup> that since he had already ruled that incident out because of its “tenuous relevance” to the issue of Y’s death, the fact that G required someone else to drive him around could be dealt with by reference simply to the fact that he did not have a drivers’ licence at that time, without specifying why.

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<sup>1055</sup> *Ibid.* Once again, his Honour opined that this evidence “ . . . stands at the lower end of the scale and, in my view, is greatly outweighed by both moral and reasoning prejudice”.

<sup>1056</sup> At [46].

<sup>1057</sup> At [47].

<sup>1058</sup> At [50].



There are two other aspects of this judgment which are of interest. The first is a reference,<sup>1059</sup> to the possibility of editing the evidence which the Crown is to be allowed to adduce, so as to “ . . . strike a balance between allowing admissible and relevant evidence [to be] tendered while not unduly prejudicing the defence . . . ”. It was in this context that his Honour indicated that evidence relating to G’s alleged assaults on, and threats towards, C might become admissible if she was “significantly challenged” regarding her alleged failure to intervene between C and Y on those occasions when he was abusing Y.

This raises the prospect of tailoring the evidence which the Crown is allowed to adduce to meet the issues arising during trial, and introduces a more flexible approach to the management of propensity evidence in light of the dynamics of a criminal trial than previous approaches had done, with their “once for all” pre-trial rulings on admissibility.

Secondly, and linked to this, is the reference by his Honour,<sup>1060</sup> to “a proposed mid-trial limiting instruction” which was attached as an appendix to his ruling. The case report does not include this appendix, but in the final paragraph of his Honour’s ruling,<sup>1061</sup> is an invitation to both counsel to offer “assistance if the limiting instruction is deemed insufficient”.

From this it would seem that, in Canada at least, counsel are being consulted in advance regarding the precise direction which the trial jury are to be given regarding the limited use to which they might put the propensity evidence which is being

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<sup>1059</sup> At [35]. The authority for this was said to be *R v Millar* (1989) 49 C.C.C. (3d) 193 (Ont. C. A.).

<sup>1060</sup> At [56].

<sup>1061</sup> [57].

admitted. This, combined with a strict application of the “precise relevance to a genuine live issue” principle, would seem ideally suited to avoid a large number of post-trial appeals in which counsel (normally for the defence) challenge the directions which were given to the trial jury. If counsel have given consent to the precise wording of those directions in advance of the jury receiving them, then this avenue of appeal is effectively closed to them.

## Conclusion

There is much in *Handy* which might profitably be adopted by other jurisdictions. First and foremost is the acknowledgment that the true probity of propensity evidence lies in its *relevance to a live issue which is of significance in the case as a whole*. Secondly there is the recognition that the more precisely identical the behaviour of an accused on a previous occasion to the way they are alleged to have behaved during the event on trial, the greater the probative value of that evidence, despite what might also be its prejudicial effect if employed for some other purpose. This is, in turn, further recognition of the fact that the true measure of the relevance of similar fact evidence is on a sliding scale from “general” propensity (of low relevance) to highly specific propensity (of high relevance).

Flowing from that initial recognition are two other important factors. The first is that if there is some reason *other than* the specific behaviour of an accused which might account for the similarities in the versions given by various witnesses, then the logic of ‘lack of coincidence’ no longer applies, and that conclusion must be abandoned. Chief among these other reasons in practice is that the seemingly independent witnesses have in fact colluded together to give a common account of events. This requires judicial intervention *ab initio*, rather than leaving the issue of the “weight” to be afforded to the witnesses’ evidence as a matter for the jury, who are not best qualified to resist the

allure of such an irrelevant distraction. The relevance of the prior circumstances may, it seems from *R v Jesse*,<sup>1062</sup> be established by reference to a prior conviction, even if guilt of that crime is denied by the accused at the new trial.

Secondly, there is a need to define the *precise issue* to which the challenged evidence is said to be relevant. It is in this regard that *Handy* represents another “intellectual breakthrough”,<sup>1063</sup> in the long-running search for a formula by which to identify those circumstances in which it is safe to adduce evidence of “bad personhood”, as it was expressed in *Handy* itself. In *Handy* came the realisation that true *probity* (with correspondingly less risk of *unfair* prejudice) is to be found in true *similarity*.

Put in more practical terms, the more closely “fact specific” the circumstances of the previous event are to the event under scrutiny, the less is the chance that the jury will employ them for the wrong reason.

It is, for example, one thing to say “John is accused of rape. He has raped before. Therefore he raped this time”. It is another to say “Whoever committed this rape left an old-fashioned dance card tucked into the blouse of the victim, with the first dance scored out. This is precisely what John did to a rape victim seven years ago. There is a strong probability that John and the new rapist are one and the same person”. In *R v B. (C.R.)*,<sup>1064</sup> Sopinke J gave the example of the “safe cracker” who is one of only three people in the country who can overcome a particular security system – the mere fact that he is a safe-cracker is inadmissible, being too “broad” in nature, but the

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<sup>1062</sup> [2012] 1 S.C.R. 716, the most recent Supreme Court of Canada’s application of *Handy* at the time of writing.

<sup>1063</sup> Note 266.

<sup>1064</sup> Note 976, at [21].

fact that he belongs in a specialist cohort of only three is admissible because it is more “propensity specific”.

With this approach it is essential that the “issue” which is identified as the one to which the propensity evidence is relevant be a “live” one. If, for example, George Joseph Smith,<sup>1065</sup> had admitted drowning Bessie Munday in her bath-tub, but claimed provocation, of what relevance, other than that of inflaming the jury against him, would have been the evidence of the identical deaths of the other two wives? It was only because his defence consisted of a denial of any deliberate “system” on his part that the identical circumstances of the deaths of the two other women became relevant. Without any such relevance, “prejudice” (of both the “moral” and “reasoning” variety) is destined to unbalance the scales, regardless of its actual weight.

The ultimate utility of *Handy* lies in its trial-focused approach to the task confronting judges presiding over interlocutory applications to admit propensity evidence. No longer are they required to balance two theoretical and largely abstract “incommensurables” ,<sup>1066</sup> in a set of hypothetical weighing pans. Instead, they may make use of what is almost a “tick-a-box” checklist composed of factors which are designed to eliminate error and maximise the appropriate use of evidence which is relevant for the right reasons. These factors, identified in *Handy*, are further considered and expanded upon in the next following chapter.

Finally, the Canadian courts have also performed a service to their common law contemporaries by demonstrating that it is possible to resolve the admissibility issues which beset propensity evidence *ahead of the trial itself, and by agreement between counsel and the trial judge, in a process which requires the counsel seeking to have the*

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<sup>1065</sup> Note 180.

<sup>1066</sup> Note 573.

*evidence admitted to articulate its precise relevance. That same agreement may incorporate the exact direction (“limiting instruction”, as it is known in Canada) to be given to the jury regarding the use to which they may put that evidence, thus eliminating a fertile source of appeals.*

## Chapter 10:

### A statutory formula

#### Introduction

Most attempts at regulating, by statute or by case-law, the circumstances under which a jury may safely be allowed to learn of the previous, or additional, bad behaviour of a criminal accused have at best led to confusion and uncertainty (as in Australia), and at worse have simply failed, as arguably has happened under both English and American law. There has, however, been a considerable measure of success from statutory intervention in New Zealand, and an encouraging signpost towards the future from the Supreme Court of Canada.

Common to all these experiences has been the role of Wigmore's "doctrine of chances". When the admission of 'similar fact evidence properly so called' has been made to depend upon a detailed and rigorous application of that doctrine, the result has been a workable formula. Failure to acknowledge it has led to confusion, uncertainty, and injustice.

First came *Makin*, with its recognition that such evidence might properly be adduced in certain *categories* of case. The primary difficulty with this approach was that it ignored the *precise reason* for which the evidence was being admitted. Next came *Boardman*, and the acknowledgment that what made those categories special was that they demonstrated an excess of "probity" over "prejudice". However, the failure to properly define and particularise either concept led to even greater confusion and uncertainty than the *Makin* approach.

Nevertheless, both approaches contained the nucleus of the element which distinguishes *admissible* forms of similar fact evidence from *inadmissible* ones. This element is *relevance to a material live issue in the case in hand*. Similar fact evidence

will *always* be “prejudicial” to an accused; the task which has to be addressed is that of ensuring that it is not *unfairly* prejudicial.

Such unfairness can only arise when the evidence is being employed for some purpose unconnected with its relevance. If it is sufficiently relevant, then its use cannot be unfair; it therefore follows that any formula for the admission of similar fact evidence must first address *the relevance of the evidence in question, and its importance in the overall case for the prosecution*. Consideration must also be given to its prejudicial effect, which in practical terms means only the risk of it being employed for the wrong reason.

For many years, the common law courts of the world were constitutionally obliged to recognise the authority of seminal judgments such as those in *Makin* and *Boardman*. At the points in their legal histories when jurisdictions such as those in Australia, New Zealand and Canada were free to develop their own approaches, the dominant authority was that of *Boardman*, and the subsequent development of their case-law was the product of their own handling of the ‘probity versus prejudice’ formula, with later English case-law having only ‘persuasive’ authority.

Experience has shown that only a fundamental and detailed recognition of the role played by logical relevance can provide a workable formula for determining whether or not it will be ‘fair’ to allow a court to receive ‘similar fact evidence properly so called’. For jurisdictions other than Canada, with the possible exception of New Zealand, there are only two potential mechanisms for ensuring that this occurs.

The first is the emphatic and authoritative imposition, by the highest appeal court in each jurisdiction, of a prescribed list of factors which future trial judges are mandated to take into account before admitting the evidence. In short, a replication of what happened in Canada in *Handy*. However, it is arguably too late for the High Court of Australia to replace *Pfennig* with a totally different approach, while the English

courts are bound by the intricate provisions of the *Criminal Justice Act 2003*. Also, as experience in New Zealand has begun to demonstrate, the introduction of a partial statutory amendment to long-established common law precedents results in a tendency for judges to approach the ‘new’ law by reference to what has gone before.

The second possible mechanism is a comprehensive statutory formula to replace all that has gone before. Experience in both England and Australia (with its Uniform Laws) has shown that once future trial judges are advised that they are writing on a clean slate, they will comply. The statutory schemes in both those jurisdictions did not fail because the judges ignored them; they failed because they *employed* them, and they were wrong.

It is possible, by reference to the laws of both New Zealand and Canada, to construct a statutory regime for the admission of ‘similar fact evidence properly so called’ which avoids all the pitfalls which have previously been encountered in this area of law, by the rigorous application of the principles of logical relevance.

### **The inglorious past**

Even Lord Herschell, in *Makin v Attorney General for New South Wales*,<sup>1067</sup> recognised that what makes evidence of an additional bad action by an accused admissible is its relevance to the matter in hand for some reason *other than the fact that it occurred*. There is no relevance in that, but there is a great deal of potential prejudice. It was unfortunate that Lord Herschell went on to express his second, *inclusionary*, rule in terms which suggested that admissible similar fact evidence might be recognised by category.

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<sup>1067</sup> Note 144.



There was considerable truth in his broad statement that in certain situations (of which the facts in *Makin* itself provided a good example) what an accused has done, additionally to what they are now accused of having done, has relevance. However, the flaw in that statement was the failure to acknowledge relevance for what it is, and to convey the impression that provided that the contested evidence had a bearing on a pre-identified “issue” before the court, then it was, by definition, admissible.

The fallacy in that approach is easily demonstrated. Assume that a doctor is accused of procuring an abortion on Patient A. Their defence is that the spontaneous expulsion of the foetus was the unforeseen side effect of a legitimate gynaecological procedure. The Crown has evidence that on a previous occasion, the doctor wilfully procured an abortion on Patient B. Under the *Makin* rubric, the testimony of Patient B would be admissible to rebut the “issue” of “innocent intent”, and the response of the jury would almost certainly be to convict. This is regardless of (let us also assume) the facts that the former abortion was performed for cash in the doctor’s house “after hours”, whereas the process involving Patient A was in an operating theatre in a public hospital as one of many procedures on the doctor’s normal clinical list. This latest procedure was to remove an ovarian cyst, whereas the previous one was purely and simply intended to abort the foetus.

It was borderline cases such as this which caused later commentators to question the utility of admitting similar fact evidence by category. The manifest “unfairness” of allowing the jury to be advised of the previous abortion,<sup>1068</sup> arises from the risk that the jury will conclude, either that “One abortion is the same as another”, or that “He did it once, so why not this time?”, when in fact the circumstances of the two events are importantly dissimilar. If, instead, a trial judge is empowered to consider any such

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<sup>1068</sup> It has also been assumed that this previous abortion has only just come to light, otherwise the doctor would not still be practising.

materially different circumstances, and to conclude that the jury should not be advised of the earlier abortion because there is a risk that they will “give a dog a bad name and hang him” ,<sup>1069</sup> then the risk of unfair prejudice is materially reduced.

The apparent “intellectual breakthrough”,<sup>1070</sup> of *Boardman* was the recognition of the role played by *relevance*, and the need to consider, at the same time, the risk of *prejudice*. But they were expressed in terms of items on a weighing scale. While it is true that the risk of *unfair* prejudice diminishes with increased relevance, it was not made clear that the “unfairness” which had to be avoided was the admission of evidence which was *insufficiently relevant to justify its admission*. If a jury cannot immediately see precisely why additional bad behaviour has *factual* relevance to what the accused is alleged to have done this time, then they are likely to employ the ‘broad-brush’ approach of “once a thief, always a thief”, despite the fact that the two types of theft are factually incomparable (for example, one was a shoplifting while the latest one is an armed robbery).

The subsequent history of the law relating to the admission of similar fact evidence was also, in notable jurisdictions such as the UK and America, overtaken by considerations of pure policy, rather than clinical reasoning. Despite - and perhaps because of - the inadequacies of the *Boardman* formula, it was still felt that too many guilty accused were escaping conviction because the law unduly restricted the revelation of their criminal history. A new era of ‘categorisation by statutory provision’ began, leaving the relevant law as a morass of conflicting and irreconcilable precedents which rendered it impossible to predict in advance whether or not a particular item of similar fact evidence was likely to be admitted. In many cases, when it was, it was to the unfair detriment of the accused.

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<sup>1069</sup> Note 805.

<sup>1070</sup> Note 266.

All of this may be avoided if one finally pays appropriate attention to what the American jurist Wigmore had been advocating as the true test of admissibility of similar fact evidence since the dawn of the Twentieth Century.

### Wigmore's "doctrine of chances"

This was summarised in Wigmore's oft-quoted observation that:<sup>1071</sup>

. . . . the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. . . . similar results do not usually occur through abnormal causes.

The "abnormal causes" to which he was referring may be defined further as "causes *other than those which may be assumed from normal human experience*". Put in positive terms, a "normal" cause is one which flows from our knowledge of human behaviour. In terms of the facts of *Makin*, it was the "normal" expectation that twelve dead infants formally in the care of the Makins had been killed by them, and it would be an "abnormal" result had each of them died accidentally.<sup>1072</sup> In terms of *Smith*,<sup>1073</sup> it would have been an "abnormal" result had each of the women whom he had married bigamously all succumbed, in such a short space of time, to precisely the same bizarre, and in itself inherently unlikely, fatal accident. The "normality" of human experience suggested that Smith himself had been the agent responsible for each of their deaths.<sup>1074</sup>

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<sup>1071</sup> 2 Wigmore, Evidence, § 302 (Chadbourn rev. 1979, Little Brown and Co, Boston).

<sup>1072</sup> This, it will be recalled, had been the reasoning employed by Windeyer J when the Makins' appeal came before the NSW Court of Appeal – see note 135.

<sup>1073</sup> Note 180.

<sup>1074</sup> See also Coleridge CJ in *Francis* (cited in note 94), who observed, in the context of a series of alleged false pretences regarding the value of jewelry, that " . . . every circumstance which shows that [the accused] was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last".

Put as broadly as this, Wigmore's "doctrine" is little more than 'probability theory grounded in human experience', but as Wigmore himself demonstrated,<sup>1075</sup> by reference to decided case authority, every circumstance in which similar fact evidence might be considered admissible is amenable to his "chances" analysis.

The first such circumstance, historically, is the rebuttal of any defence based upon innocent intent, innocent association, accident and the like. When the acts committed by an accused, including the last of them (in respect of which they are on trial) are equivocal in terms of guilty intent, the sheer number of them may defy coincidence or accident. I might incorrectly enter the wrong amount on a cheque in my favour once by accident, but the more times I do so the more unlikely is the possibility that any of the incorrect entries was either accidental or innocent.

This line of reasoning may be applied in any context in which the *actus reus* of each of the events is admitted, but the *mens rea* is denied. There is no need for the acts themselves to be identical, since the reason for adducing the additional event evidence<sup>1076</sup> ". . . is merely to discover the intent accompanying the act in question;"<sup>1077</sup> and the prior doing of similar acts . . . is useful in reducing the possibility that the act in question was done with innocent intent".

If, for example, several students claim that during "one on one" tutorials with their tutor they were indecently assaulted, the precise nature of those alleged assaults

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<sup>1075</sup> *Ibid.*

<sup>1076</sup> Wigmore, *ibid.* However, as Wigmore pointed out, the acts must all be "similar", because "Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance."

<sup>1077</sup> That is, the act now on trial.

need not be identical.<sup>1078</sup> The inherent unlikelihood that several students would make the same startling accusation may be employed to rebut any suggestion that what occurred was purely innocent and academic. Wigmore himself gave the example of two men on a shooting expedition, one of whom notices several shots passing dangerously close to him; when the final one hits him, it is difficult not to conclude that they were *all* aimed at him by his shooting companion.

The second broad use of ‘chances’ reasoning does, however, call for greater similarity between each alleged act on the part of the accused. This involves the combining of each of the acts into a “scheme”, “system” or “plan” pursued by the accused, of which the act on trial is one instance, but which reveals the underlying criminality of the behaviour as a whole. *Makin* and *Smith* were clear examples of this process of reasoning. Only by considering the deaths of the babies in *Makin*, and the ‘wives’ in *Smith*, to be instances of a broader scheme (to benefit financially) devised by the accused, could it then be concluded that the only way in which that scheme could be successfully implemented was for each of the victims to die at the hands of the accused. From there, it was a simple process of arguing *deductively* that the death for which the accused was on trial was part of that scheme.<sup>1079</sup>

The need for greater or lesser similarity between each of these “scheme” events will vary according to how the logic is being employed. In *Makin*, the “abnormal” event was so many babies dying whilst under the care of the Makins; in *Smith* it was the bizarre manner of the relevant deaths. If, in *Smith*, one of the three wives had died after falling down a flight of stairs, while a second had died from arsenic poisoning, could the

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<sup>1078</sup> See, for example, *Shearing v R* (note 1030), in which the Supreme Court of Canada ruled that what made a series of sexual assaults by S relevant was not the similarity in their detail, but the commonality of the accused’s abuse of his spiritual dominance over his victims.

<sup>1079</sup> In Wigmore’s words (*ibid*), what is required is “. . . such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations”. The “common features” in *Makin* were the deaths themselves; it would not affect the reasoning employed if some of the infants died of malnutrition, while others were strangled. But note how it would be different in the case of *Smith*.

Crown have adduced evidence of their deaths in order to persuade the jury that the wife who had died in the bath had been murdered by Smith? All three had died whilst living in the same house as him, but there was insufficient similarity in their deaths to incite anything other than a vague suspicion of Smith's involvement.

The highest degree of similarity is called for when the similar fact evidence is being employed in order to prove *identity*. In such cases, the jury is being invited to conclude that because the crime under investigation was carried out with "hallmark", "signature" or "*modus operandi*" features which can be associated with the accused, therefore they must be the culprit on this occasion. It is first necessary to associate the accused sufficiently with that *modus operandi*; this may be done either by reference to an offence in the past which has been judicially determined to have been committed by them (either on a guilty plea, or following a finding of guilt following trial), or by means of their being convincingly linked (for example, by means of DNA, as in *Arp*<sup>1080</sup>) to one offence in the series which bears a strong factual similarity to that (or those) on trial.

A good example of this process was the English case of *Straffen*.<sup>1081</sup> S had been confined in a criminal lunatic asylum as the result of his murder of two young girls. They had been strangled and left by the roadside where they could easily be found, and there had been no apparent motive for their deaths. S escaped from the asylum, and shortly thereafter, a short distance away, another small girl was found murdered in identical circumstances. These identical circumstances, taken together with S's opportunity to have committed this latest offence, were deemed sufficient to identify S as the perpetrator.

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<sup>1080</sup> Note 984.

<sup>1081</sup> Note 226.

### **Other forms of propensity evidence not covered by “doctrine of chances” reasoning**

As has been described in previous chapters, there are certain other contexts in which the Crown may seek to adduce evidence of additional misdeeds by an accused person. However, it is submitted that they do not fall within the description of ‘similar fact evidence properly so called’,<sup>1082</sup> since their admissibility cannot be assessed by reference to any similarity between those additional misdeeds and the issue before the court to which they are relevant. Other admissibility tests apply to these, and they are therefore not included within the statutory provisions which are proposed below, since they do not involve the application of “doctrine of chances” reasoning.

The first of these consists of evidence of misdeeds which are unavoidably encompassed within the facts of the charge for which the accused is on trial. In England,<sup>1083</sup> these are defined as matters which “have to do with the offence charged”. An obvious example is provided by the facts of the New Zealand case of *R v Katavich*,<sup>1084</sup> in which the Crown was allowed to adduce evidence of what had taken place previously in the bathhouse of which K was the manager, in order to prove the offence charged, which was that the premises were used as a “place of resort” for homosexual activity. The admissibility test in all such cases is whether or not proof of the offence requires such evidence to be led, and the accused cannot be said to have been “ambushed” by the admission of such evidence once they are informed of the nature of the charge. There is a parallel here with the Scottish requirement that before propensity evidence may be led, the accused must be given “fair notice” of it.<sup>1085</sup>

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<sup>1082</sup> Note 2.

<sup>1083</sup> Law Commission Final Report, “Evidence of Bad Character in Criminal Proceedings” (Cm. 5257), Summary, para.3 – see note 324.

<sup>1084</sup> [1977] 1 NZLR 436 – see note 866. Another example might be the offence of escaping lawful custody; the “lawful custody” element of the offence cannot be proved without evidence that the accused was in lawful custody in the first place, ostensibly for some previous offence.

<sup>1085</sup> See *Nelson v H.M. Advocate*, note 768.

Closely aligned, chronologically, with evidence which is part of the charge is evidence which is part of “a connected series of events . . . which should be considered as one transaction”.<sup>1086</sup> The short title for such evidence is “*res gestae*”, and the justification for its admission is to allow the jury to be given ‘the whole story’ behind the offence charged. An obvious example is the prior theft of the getaway vehicle used in a bank robbery.<sup>1087</sup> *Res gestae* evidence possesses its own admission rules.<sup>1088</sup> The offence(s) thereby disclosed, and the offence(s) on the indictment are frequently far from similar, and nothing may be gained by any attempt to apply “doctrine of chances” logic to them.

Giving the jury ‘the whole story’ is also the frequent justification for the admission of “uncharged act” evidence in cases in which an accused is charged with the sexual abuse of a victim (often a child relative), and that victim is allowed to testify regarding other sexual acts committed by the accused on other occasions which are not represented in the indictment charges. Another such justification is to explain away the failure of the victim to make a “fresh complaint” at the time, or to prevent the indictment event(s) from appearing to be bizarre and isolated events.

It is tempting to describe such additional events as being “similar fact” in nature, since the uncharged acts are frequently factually close to those on the indictment. However, they lack one of the essential ingredients of ‘similar fact evidence properly so called’, which is lack of coincidence. In cases in which a group of independent complainants make startlingly similar allegations against the same accused, there is

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<sup>1086</sup> Per Dixon J in *O’Leary v The Queen* (note 631), at 577.

<sup>1087</sup> Another example is provided by the facts of *Lewis v United States* (note 523), in which L was charged with a burglary which had been committed with the aid of a specific cutting tool, and evidence was admitted of his theft, the same evening, of just such a tool. It was admitted in order to show “plan”, but it might equally as well have been admitted as part of the *res gestae*. The two offences were not factually similar, and it obscures the true nature of ‘similar fact evidence properly so called’ to ascribe the label of “similar fact evidence” to them.

<sup>1088</sup> See, for example, *R v Andrews* [1987] AC 281.



probative value in the unlikelihood that they could all have come up with the same description of events, absent collusion or contamination. But when only *one* complainant insists that the same thing happened on many occasions in the past, there is no such corroborative effect. A complainant who is mistaken or untruthful about the true nature of one event is just as capable of being so in respect of all such events.

It is submitted that “uncharged act” evidence should not be admitted at all, since it breaches the “bolster rule” ,<sup>1089</sup> which prohibits a witness from enhancing their credibility by telling the same “story” more than once. However, even should it be admissible, it does not lend itself to “doctrine of chances” logic, for the reason already advanced. There is no “chance” element in a witness making repeated allegations of the same thing, even if they *are* alleged to have occurred on different occasions.

When one eliminates these categories of propensity evidence which do not lend themselves to “doctrine of chances” logic, there still remain a large number of situations in which events from an accused’s life can be said to have a highly probative bearing on what they are alleged to have done on the occasion under investigation. They have in common the *factual similarity* of the events themselves, which appears to defy explanation on any ground other than that alleged by the Crown. For this reason, they may be regarded as probative, to a greater or lesser degree, according to the *extent* of that similarity.

These remaining situations consist of what in this thesis has been identified as ‘similar fact evidence properly so called’. They are the *only* situations in which what is being admitted should be labelled “similar fact evidence”, and a good deal of confusion which currently exists in connection with “propensity” evidence generally can be

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<sup>1089</sup> See McHugh J in *Palmer v R* (note 615), at 21. This also lies at the root of the ban on the admission of prior consistent statements by a witness or party; see *Cork v Cork and Cooke* [1958] P 93.

eliminated if this distinction is maintained. As indicated above, the remaining categories of “propensity” evidence are admitted under different rationales, and different admission tests will apply to them which are outside the scope of this thesis.

In relation to ‘similar fact evidence properly so called’, it is possible to devise a procedural structure under which the degree of similarity which justifies its admission is judicially considered, and a decision made regarding its admissibility. The opportunity may also be taken to assess the risk of *unfair* prejudice to which an accused may be exposed by its admission, while at the same time agreeing in advance between the parties (a) the precise issue to which the evidence is said to be relevant (which will be the purpose for which it will be admitted), and (b) the instruction to be given to the trial jury regarding the use which they may make of it, and the prohibition against any *other* use.

Partial precedents for such a procedure may be found in the legislation of New Zealand (Chapter 8), and the common law of Canada (Chapter 9).

### **A proposed statutory formula for the appropriate admission of ‘similar fact evidence properly so called’**

Below is a suggested statutory provision to govern the admissibility of similar fact evidence properly so called. The italicised numbers in brackets relate to the notes below the proposed provision itself.

#### **Similar fact evidence in criminal cases**

(1) In this section, “*similar fact evidence*” means, for the purposes of criminal

proceedings, evidence that tends to show that at any time a person acted in a particular way, or had a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved [1], but does not include evidence of any such act, omission, or state of mind that is –

- (i) an element of the offence for which the person is being tried [2]; or
- (ii) evidence which forms part of the *res gestae* of the offence for which the person is being tried [3]; or
- (iii) sought to be adduced by the person who is being tried. [4]

(2) Similar fact evidence shall not be admissible against an accused person in criminal proceedings unless the provisions of subsections (3) to (7) hereof have been complied with.

(3) An application for leave to adduce similar fact evidence (“***certificate of leave to adduce similar fact evidence***”) shall be made to the court of trial in advance [5] of the trial in respect of which it is sought to adduce the similar fact evidence. In that application, the applicant shall specify the issue in the trial to which the similar fact evidence is said to be relevant. [6]

(4) The judge hearing the application for a certificate of leave to adduce similar fact evidence shall, before issuing a certificate;

(a) hear both parties; and

(b) consider the factors itemised in (5) hereof.

(5) The factors referred to in (4) hereof shall include, but shall not be limited to:

[7]

(a) the nature of the issue to which the similar fact evidence is said to be relevant, including;

(i) the importance of that issue to the case as a whole; and

(ii) the extent to which that issue is still in contention in the case.

(b) the underlying unity between those facts which are said to constitute the similar fact evidence and the acts, omissions, events or other circumstances relating to the issue in the case to which the similar fact evidence is said to be relevant; and

(c) the closeness in similarity of those facts which are said to constitute the similar fact evidence to the acts, omissions, events or other circumstances relating to the issue in the case to which the similar fact evidence is said to be relevant; and

(d) the connection in time between those facts which are said to constitute the similar fact evidence and the acts, omissions, events or other circumstances relating to the issue in the case to which they are said to be relevant; and

(e) the frequency with which the acts, omissions, events or other circumstances which are said to constitute the similar fact evidence are said to have occurred.; and

(f) the extent to which the acts, omissions, events or other circumstances which are said to constitute the similar fact evidence and the acts, omissions, events or other circumstances relating to the issue in the case to which they are said to be relevant are unusual; and

(g) any dissimilarity of features between the acts, omissions, events or other circumstances which are said to constitute the similar fact evidence and the acts, omissions, events or other circumstances relating to the issue in the case to which they are said to be relevant;

(h) the extent to which the acts, omissions, events or other circumstances relating to the issue in the case to which the similar fact evidence is said to relate may be proved by other evidence; and

(i) when a number of persons will be making allegations said to constitute the similar fact evidence which it is sought to have adduced;

(i) the number of such persons; and

(ii) whether or not such allegations may be the result of collusion between the witnesses, or the contamination of any such allegation by a source external to the witness making them, or the

suggestibility of the witness making them[8]; and

(j) whether or not the admission of the similar fact evidence would be likely to unfairly predispose the tribunal of fact [9] against the party against whom it is proposed to adduce it, or result in the tribunal of fact giving the similar fact evidence disproportionate weight when arriving at its verdict; and

(k) the existence of any factor which might;

(i) account for any apparent similarity or similarities between those acts, omissions, events or other circumstances which are said to constitute the similar fact evidence and the acts, omissions, events or other circumstances to which they are said to be relevant other than absence of coincidence [10]; or

(ii) make it invalid to draw any comparison between those acts, omissions, events or other circumstances which are said to constitute the similar fact evidence and the acts, omissions, events or other circumstances relating to the issue in the case to which they are said to be relevant.  
[11]

(6) A judge to whom an application is made in accordance with (3) hereof shall not grant a certificate of leave to adduce similar fact evidence unless satisfied on a balance of probabilities [12] that it is appropriate to do so.

(7) Prior to granting a certificate of leave to adduce similar fact evidence, the judge to whom application therefor was made shall, after appropriate consultation with both parties, include within it a statement of the issue in the case to which the similar fact evidence is deemed to be relevant (“*statement of relevance of similar fact evidence*”). [13]

(8) At any subsequent trial to which the certificate of leave to adduce similar fact evidence relates, the trial judge shall, at the point in the trial immediately after which the similar fact evidence has been adduced, cause to be read to the tribunal of fact the statement of relevance of similar fact evidence, together with a direction to the tribunal of fact that the similar fact evidence is not to be treated as relevant for any other purpose. [14]

[1] This definition of similar fact evidence is taken from s 40 of the *Evidence Act 2006* (N.Z.).<sup>1090</sup> That section was described as applying to “propensity” evidence generally, but it obviously, at the same time, incorporates similar fact evidence properly so called. The New Zealand section was also drafted so as to apply in all cases, but in the above proposal it has been limited in its application to criminal cases, which is the context in which this thesis has been written. The removal of the sub-clause “for the purposes of criminal proceedings” would enable it to be employed in all proceedings, with suitable supplementary adjustments in wording to eliminate references to an accused person.

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<sup>1090</sup> Note 912.

[2] This has been included so as not to inhibit the Crown from proving facts which are an element of the offence on trial.<sup>1091</sup>

[3] As argued above, facts which are admitted under the *res gestae* exception do not require to have their admission justified under any propensity rule.

[4] It is not uncommon for an accused to rely on propensity evidence in their own defence, and this should not be inhibited. An example might be that of a person accused of murder who is pleading self-defence, and who wishes the court to be advised of the violent history of the alleged victim. Since the object of the statutory provision is to ensure a fair trial in cases in which the propensity history which is being admitted is that of the accused, a broad exclusionary provision relating to *all* propensity evidence is not required, and would unduly impede the effective advancement of a genuine defence. Any “tit for tat” consequence to an accused of maligning the character of the victim can be dealt with under those provisions dealing with the “shield” protecting an accused who elects to testify. It may also be provided for in a further statutory provision which enables such retaliatory evidence to be admitted by the Crown in chief.

[5] No minimum time period has been specified; an appropriate period in line with pre-existing criminal justice legislation might be inserted by legislators when and if adopting this provision.<sup>1092</sup> The wording is apt to cover even an application on the first morning of trial, prior to the swearing in of any jury, but would not, it is submitted, cover any *voir dire* once the trial has commenced. This is considered appropriate, in order that the defence team may have fair notice, ahead of opening addresses, of what is to be alleged.

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<sup>1091</sup> As per the example given earlier, it allows the Crown, for example, in a trial for escaping lawful custody, to prove that the accused was in lawful custody without encountering defence demands that such evidence be the subject of an application for a certificate of leave.

<sup>1092</sup> For example, in some jurisdictions it might be required that the matter to be raised in a “pre-trial” application, or an interlocutory motion.



[6] It is envisaged that the identification of the “issue” will be required as part of any application. Forcing the prosecutor to be specific at this stage may serve to eliminate any vagueness or evasion regarding the *true* reason why admission is sought (e.g. to prejudice the jury against the accused). It also has the consequence that all those involved are required to focus their attention on the true relevance of the evidence which it is sought to adduce.

[7] These factors are an amalgamation of those specified in s 43 of the New Zealand Act,<sup>1093</sup> and the Canadian case-law, most notably *Handy*.<sup>1094</sup> There was considerable unity between the significant factors identified in each jurisdiction.

[8] It is submitted that the possibility of collusion or contamination should not be left simply as an issue for the jury, but should militate towards the exclusion of the evidence entirely. This is for the reason given in *Handy*,<sup>1095</sup> that the presence of such factors is “. . . destructive of the very basis on which the similar fact evidence was sought to be admitted”. It also accords with the reasoning of the Australian High Court in *Hoch*.<sup>1096</sup>

[9] This is a well-understood term, and incorporates not only the traditional jury but also a magistrate or trial judge in a “judge only” trial. It is now established practice for a judge conducting a trial alone to “direct” themselves regarding any principles of law which govern the case. This provision is also intended to facilitate consideration of the potential “prejudicial effect” aspect of similar fact evidence. It is submitted that it is more appropriate to include it as merely one factor in the overall admissibility matrix

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<sup>1093</sup> See page 284.

<sup>1094</sup> Note 990.

<sup>1095</sup> Note 1014.

<sup>1096</sup> Note 303.

than to perpetuate the “probity versus prejudice” formula which has caused so much difficulty in the past. It also serves to focus once again on the important consideration that what has to be avoided is not “prejudice” per se, but “unfair” prejudice.

[10] This is drawn from *Handy*. It also reinforces the need to be cautious of factors such as collusion or contamination.

[11] This enables due regard to be given to changed circumstances relating to the accused, and reflects the school of thought that offending is ‘situational’ in nature. An obvious, albeit crude, example might be that of the former rescidivist sex offender who has subsequently undergone chemical castration. Successful drug, alcohol or anger management counselling might also qualify.

[12] The choice of this standard of proof circumvents the difficulty faced by any judge being required to pre-assess the reaction of a future jury to the evidence which is to be adduced should proof “beyond reasonable doubt” be required for admissibility. This became manifest in the wake of the inappropriately high standard of admissibility imposed by the Australian High Court in *Pfennig*.<sup>1097</sup> Under Australian law, the “balance of probabilities” test is normally required for proof of the admissibility of other types of contested evidence such as a confession.<sup>1098</sup>

[13] This provision is intended to leave neither of the parties in any doubt as to the *sole* purpose for which the similar fact evidence is being admitted. It also

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<sup>1097</sup> Note 564.

<sup>1098</sup> See *Wendo v The Queen* (1963) 109 CLR 559. In *Shepherd v The Queen* (1990) 170 CLR 573, the Australian High Court also held ‘a balance of probabilities’ to be the appropriate standard of proof for individual items of circumstantial evidence being considered by a jury as one element of a Crown case which they are then required to find proved “beyond reasonable doubt” before they may convict. Given the circumstantial nature of similar fact evidence, it would be inappropriate to impose the same standard at the admissibility stage that the jury is required to employ at trial.

establishes a continuum from the admissibility assessment stage to the trial stage, when the trial judge, and possibly the counsel, may be different.

[14] This follows on from [13], and prescribes an appropriate judicial direction which incorporates a “propensity warning” against “forbidden reasoning”.

Finally, it will be noted that subsection (4) makes it mandatory for the judge ruling on admissibility to consider the factors specified in subsection (5). This makes it a matter of *law*, rather than the exercise of a judicial discretion, and results in the resulting decision being more readily admissible.

## Conclusion

As previous chapters of this thesis have revealed, the conundrum which bedevils the admissibility of evidence which is, at one and the same time, highly relevant to an issue in a criminal case *and* potentially prejudicial to the accused, cannot be resolved by broad statements which seek to justify its admission by category or by broadly-stated formula.

‘Similar fact evidence properly so called’ can justify its own admission by reference to its *relevance*, once that relevance is identified by means of a close and logical study of the factors which *make* it relevant. Any prejudice which flows from that relevance is the natural consequence of its relevance *for some reason other than the mere fact that the event in question occurred*. Such prejudice cannot be “unfair” if it is based on the apparent truth which emerges from the application of “the doctrine of chances”, rather than the pre-disposing effect of a court being informed that the accused has a ‘past’, and nothing more.

A 'categories' approach fails to enquire sufficiently into relevance. A 'probity versus prejudice' approach overlooks the fact that only *unfair* prejudice need be eliminated, but fails to identify it. Public policy emanating from a commitment to 'jail more criminals' has no logical pedigree, and no moral validity.

A new test based on the identification of those factors which make 'similar fact evidence properly so called' relevant to a case, while at the same time outlawing its use for any purpose *other than that for which it is relevant*, is of considerably greater potential in ensuring justice for all concerned.

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